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REDEEMING THE WELSHED GUARANTEE: A SCHEME FOR ACHIEVING JUSTICIABILITY

ETHAN J. LEIB*

I. INTRODUCTION

I am scavenging here.¹ The feast of the republican revival in the law reviews is long over,² and one is more likely to encounter a commemorative symposium upon the anniversary of its death than a celebration of its continued vitality in legal scholarship.³ But I have

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1. See Kathryn Abrams, *Law's Republicanism*, 97 Yale L. J. 1591, 1591 (1988) (noting that "[l]egal scholars are natural scavengers").

2. For two oft cited articles heralding the republican revival in the law schools, see Frank Michelman, *Law's Republic*, 97 Yale L. J. 1493 (1988); Cass Sunstein, *Beyond the Republican Revival*, 97 Yale L. J. 1539 (1988).

3. See generally Symposium, *The Republican Civic Tradition*, 97 Yale L. J. 1493 (1988) (addressing objections to recent proposals to reconsider constitutionalism in light of "civil republicanism," a theoretical approach that emphasizes political equality, participation in government, and a variety of republican values); Symposium, *Roads Not Taken: Undercurrents of Republican Thinking in Modern Constitutional Theory*, 84 Nw. U. L. Rev. 1 (1989) (exploring contemporary constitutional understanding in light of the historical dialogue between Federalists and Anti-federalists); Anthony E. Cook, *Forward: The Postmodern Quest for Community: An Introduction to a Symposium on Republicanism and Voting Rights*, 41 Fla. L. Rev. 409 (1989) (assessing the differences between republicanism and liberalism); G. Edward White, *Reflections on the "Republican Revival": Interdisciplinary Scholarship in the Legal Academy*, 6 Yale J. L. & Human. 1 (1994). For a historical account of the revival, White recommends a look at Stephen M. Feldman, *Republican Revival/Interpretative Turn*, 1992 Wis. L. Rev. 679 (June, 1992) (presenting "a confirmation of the 'familiar' status

mined the discourse about republicanism for its oversights. Investigation into its relationship with the Guarantee Clause, the one place in the Constitution directly allocated to republicanism,⁴ reveals little attempted in the way of integration, largely because the Guarantee Clause literature is even more dead than the republican revival literature.⁵ The Guarantee Clause has a history of “missed

of the republican revival among legal scholars”).

4. U.S. Const. art. IV, § 4 [hereinafter “the Guarantee Clause”] (reading “[t]he United States shall guarantee to every State in this Union a Republican Form of Government”).

5. But see Ira C. Rothgerber, Jr., *Conference on Constitutional Law: Guaranteeing a Republican Form of Government*, 65 U. Colo. L. Rev. 709 (1994) (exploring which political actors and institutions are responsible for republican government). There have been other creative attempts to make use of the Clause. E.g. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 18-19 (1971) (observing that the Guarantee Clause has not been neutrally applied to the various values our society places on different rights); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 118 (Harv. U. Press 1980) (exploring the proposition that the Guarantee Clause requires that states hold popular elections); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 2 (1988) (positing that “the states cannot enjoy republican governments unless they retain sufficient autonomy to establish and maintain their own forms of government”); James J. Seeley, *The Public Referendum and Minority Group Legislation: Postscript to Reitman v. Mulkey*, 55 Cornell L. Rev. 881, 905-10 (1970) (arguing that the referendum and republicanism are not necessarily mutually exclusive); see e.g. Thomas C. Berg, *The Guarantee of Republican Government: Proposals for Judicial Review*, 54 U. Chi. L. Rev. 208 (1987) (rejecting *per se* nonjusticiability and urging judicial review of certain state action); Jay S. Bybee, *Insuring Domestic Tranquility: Lopez, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 Geo. Wash. L. Rev. 1 (1997) (arguing that the Guarantee Clause should not interfere with state criminal provisions, particularly domestic violence statutes); John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 Am. Crim. L. Rev. 427 (1998) (arguing that the right to “honest service” from the government should be defined by independent federal or state laws); Adam H. Kurland, *The Guarantee Clause As a Basis for Federal Prosecutions of State and Local Officials*, 62 S. Cal. L. Rev. 367 (1989) (viewing the Guarantee Clause as conferring legislative power to deal with corrupt government officials); Douglas G. Smith, *Natural Law, Article IV, and Section One of the Fourteenth Amendment*, 47 Am. U. L. Rev. 351 (1997) (comparing the Guarantee Clause with the Privileges and Immunities Clause); Thomas A. Smith, Student Author, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, 93 Yale L. J. 561 (1984) (interpreting the importance of the Guarantee Clause to reapportionment cases); see generally e.g. Arthur E. Bonfield, *Baker v. Carr: New Light on the Constitutional Guarantee of Republican Government*, 50 Cal. L. Rev. 245 (1962); Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 Minn. L. Rev. 513 (1962) [hereinafter Bonfield,

opportunities and might-have-beens.”⁶ In this article, I will try to resuscitate both legal republicanism and the Guarantee Clause by creating a lichen, where what is left of each can help the other thrive, albeit parasitically.

This project is only possible because the legal literatures addressing the republican revival and the Guarantee Clause make the same fundamental error: They each fixate upon the possibilities for judicial action.⁷ Although the necessary corrective for the judge-centered nature of the republican revival has already been provided in a series of comments and articles,⁸ the tweak went too far in the opposite direction, urging a primarily popular component to the inculcation of civic virtue.⁹ Quite rightly, this curative focused on the necessary contribution of civil society to the attainment of the catalogue of virtues republicans prize, emphasizing the help voluntary associations can provide with breeding the substantive norms neo-republicanism hopes to help germinate within the populace.¹⁰ What got overlooked in the scaling back of the emphasis upon judicial activism is what Jeremy Waldron has called the “dignity of legislation.”¹¹ Here, I reawaken the naïve view that legislatures can sometimes embody what is good about republicanism—deliberative processes, producing outcomes that public

Desuetude]; Charles O. Lerche, *The Guarantee of a Republican Form of Government and the Admission of New States*, 11 J. Pol. 578 (1949).

6. William M. Wiecek, *The Guarantee Clause of the U.S. Constitution* 6 (Cornell U. Press, 1972).

7. See Abrams, *supra* n. 1, at 1602 n. 50 (discussing the judge-centric nature of the republican revival); M.N.S. Sellers, *The Sacred Fire of Liberty* 117-18 (N.Y.U. Press, 1998) (arguing that Michelman and Sunstein both leave the judiciary to do the work of neo-republicanism). These arguments are given flesh *infra* at notes 10-18 and the accompanying text.

8. See e.g. Abrams, *supra* n. 1; Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 Yale L. J. 1623, 1625 (1988) (noting that “it is at least ironic that much of the legal scholarship of the republican revival, rather than working to promote participation and discourse . . . is as court-centered as the pluralist scholarship from which it distinguishes itself”).

9. Abrams, *supra* n. 1, at 1597.

10. See generally Philip Pettit, *Republicanism: A Theory of Freedom and Government* 246-70 (Oxford U. Press 1997); Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* 116-33 (Simon & Schuster 2000); Michael Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* 201-49 (Harv. U. Press 1996); Charles Taylor, *The Ethics of Authenticity* 8-10 (Harv. U. Press 1991); Charles Taylor, *The Malaise of Modernity* 25-29 (Anansi Press 1991).

11. Jeremy Waldron, *The Dignity of Legislation* 4-5 (Cambridge U. Press 1999).

choice or courts might not.¹² Occasionally, legislative deliberations can be trusted without elaborate judicial policing.¹³

Most recently, liberal republicans have been forced to watch as the Supreme Court has whittled away Congress's powers under both the Commerce Clause,¹⁴ as well as the Section Five Enforcement Clause of the Fourteenth Amendment,¹⁵ thereby neutralizing Congress's most fruitful powers employed in service of progressive legislation.¹⁶ In many of these recent cases, the neo-republicans would probably like to say that Congress's activism was more in the spirit of progressive republican ends than the very judicial activism for which

12. *But see* Joseph M. Bessette, *The Mild Voice of Reason: Deliberative Democracy & American National Government* 1-5, 150-80 (U. Chi. Press 1994) (arguing that legislatures do indeed embody this feature of republicanism and that deliberation explains their behavior in ways that other theories cannot); Arthur Maass, *Congress and the Common Good* 13-18 (Basic Books, 1983) (employing a "deliberative model" to investigate Congressional decision-making, particularly in inter-Congressional contexts as well as Congressional-Executive relations). For a review of this endeavor, *see* Keith Whittington, *In Defense of Legislatures*, 28 Pol. Theory 690, 693-95 (2000); Keith Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* 3 (Harv. U. Press 1999) (discussing the idea of "constitutional constructions" and the entire "extra-judicial constitutional interpretation" literature); Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 Yale L. J. 1707, 1709 (2002). Frickey and Smith argue against the coherence of the "due deliberation" model, where courts impose upon Congress procedural requirements to produce "rational, articulated decision[s]." *Id.* The argument to follow here is not of the "due deliberation" variety; here I argue that congressional action under the Guarantee Clause should be considered nonjusticiable.

13. *But see* Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 4, 8-9 n. 8 (1996) (arguing against the approach in Frank Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 Harv. L. Rev. 4 (1986), and "insist[ing] that the principal vehicle" for deliberative democracy and the inculcation of republican virtues "is the legislature, not the judiciary"). Sunstein, however, still uses the Court "to play a catalytic and supplementary role." *Id.* at 9 n. 8. While inter-branch dialogue and judicial help is a nice ideal, the recent real-world federalism cases militate against thinking too hard about how the Court can help; its doctrine must be used against it to site power elsewhere.

14. U.S. Const. art. I, § 8, cl. 3.

15. U.S. Const. amend. XIV, § 5.

16. *See e.g.* *Bd. of Trustees of the U. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 92 (2000); *U.S. v. Morrison*, 529 U.S. 598, 627 (2000); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); *U.S. v. Lopez*, 514 U.S. 549, 568 (1995).

they spent the 1980s fighting.¹⁷ Given the current state of Commerce Clause and Enforcement Clause jurisprudence, neo-republicans would be well advised to shift their attention from the justification for judicial action, to the justification for Congress to act in service of republican ends (assuming, of course, that Congress uses that esteemed republican process of deliberation).¹⁸

Republicans have always trusted representatives for their capacity to deliberate: James Madison wanted “to refine and enlarge the public views by passing them through the medium of a chosen body of citizens.”¹⁹ Alexander Hamilton saw the representative body as an “opportunity for cool and sedate reflection.”²⁰ To be sure, republicans will always be suspicious when legislatures function on the interest-group pluralist model; they will have an impulse to recruit the judicial branch to enforce interest-free deliberation for the common good by a group of trustees.²¹ If the jurisprudence of the Guarantee Clause teaches us anything, however, it is that the political branches of government must have a say in defining what republicanism requires for the polity. Republicans should encourage Congress to instantiate its own ideas about republicanism through a legislative power—a power that may be found in the Guarantee Clause.²² Congress may then be both helpful for the theory republicanism as well as a practical means for the promotion of republican ends.

17. Sellers, *supra* n. 7, at 119 (taking the somewhat cynical view is that the “republican revival first developed in American law schools to provide a rationale for judicial activism following President Reagan’s re-election in 1984”).

18. Frickey & Smith, *supra* n. 12, 1755-56 (arguing that deliberation is too much to ask of legislatures and that judges cannot police it).

19. James Madison, *The Federalist No. X* in *The Federalist: A Commentary on the Constitution of the United States* vol. I, 62, 67 (Tudor Publg. 1937).

20. Alexander Hamilton, *The Federalist No. LXXI*, *supra* n. 19, at vol. II, 59, 60.

21. See Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1730 (1984).

22. While an exhaustive treatment of the subject would include attention to the way another political branch, the Executive, might utilize the power of the Guarantee Clause and republicanism, I generally limit my discussion here to Congress. It is, after all, Congress that is currently experiencing diminished capacities owing to a Court that is insistently divesting it of constitutional powers. Moreover, as I argue in Part III, Congress is a most appropriate site for debates about republicanism. For one historical example of a President considering his powers under the Guarantee Clause, see Kurland, *supra* n. 5, at 448-49.

On a similar note, theorists of the Guarantee Clause have also been too invested in making arguments for when and how the judiciary ought to enforce the Clause and render it justiciable; they are concerned with the judiciary being a site for and promoter of republicanism's agenda. In large measure, I am sympathetic to many of the arguments for the Clause's justiciability. The power of judicial review should indeed extend into the domain of some "political questions,"²³ and there is little virtue in too much passivity—especially once the polity grants the need for counter-majoritarian judicial review in a liberal constitutionalist regime.²⁴ If a court wants to show deference to a political branch, there is no intuitive reason why jurisdiction should be denied. Instead, the Court can grant jurisdiction and just defer, as the Court will occasionally do, especially in military matters.²⁵ But I suspect that the Court's 150-year-old commitment to nonjusticiability will not succumb to the urges of a few law review articles.

Thus, embedded in my suggestion that Congress re-pass its progressive legislation under the jurisdictional basis of its Guarantee Clause power, is the realism the Court will react with hostility. Nonetheless, the general scheme here is aimed to achieve justiciability through the back door. If Congress were to exercise the powers that the Court generally indicates are rightfully its own under the Guarantee Clause, the Court would likely be encouraged to tailor a jurisprudence

23. Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 Yale L. J. 597, 625 (1976); Martin Redish, *Judicial Review and the 'Political Question'*, 79 Nw. U. L. Rev. 1031, 1033 (1985); see Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 Colum. L. Rev. 237, 239-41 (2002); Martin H. Redish, *The Federal Courts in the Political Order: Judicial Jurisdiction and American Political Theory* 111-35 (Carolina Acad. Press 1991) [hereinafter Redish, *Federal Courts*]. Redish argues "the political question doctrine should play no role whatsoever in the exercise of the judicial review power." *Id.* at 112.

24. But see Alexander Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 Harv. L. Rev. 40, 43 (1961) (enumerating the court's passive virtues); Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 111-98 (Yale U. Press 1962) [hereinafter Bickel, *Least Dangerous*] (devoting a chapter to the passive virtues).

25. See e.g. *Rostker v. Goldberg*, 453 U.S. 57, 67-69 (1981) (deferring to a military policy that discriminates against women); *Korematsu v. U.S.*, 323 U.S. 214, 217-18 (1944) (deferring to the wartime internment of Japanese-Americans). Though these cases may be viewed as achieving unfortunate results, it is hard to imagine that it would be preferable for the Court to show cowardice by denying justiciability.

of the Guarantee Clause. Theorists of the Clause have been urging this for decades. When the Court is confronted with congressional legislation under a new power, we should expect that the Court will make, even if it cannot find, “judicially discoverable and manageable standards,” precisely what it has denied is possible in “political questions” raised in challenges under the Guarantee Clause.²⁶

The approach of this article is a scheme, in every sense of the word. While arguments for justiciability continue to be made, a pragmatic way to achieve it has not been spelled out. Part II will lay out versions of republicanism I hope to see discussed in the context of the Guarantee Clause. Part III will explore republicanism’s excessive attention on the courts, recommending the aforementioned approach of Jeremy Waldron. Part IV will briefly suggest how some of the legislation recently curtailed by the Supreme Court might be justified under a theory of legislative, as opposed to court-centered, republicanism. Part V will show how the fixation on justiciability in the Guarantee Clause discourse is misdirected, making the same error as the republican revival. Part VI will address why the Guarantee Clause is a hopeful place to look for congressional authority to enact republican ends; the argument is, based on the Clause’s history in the courts as well as in Congress. The Conclusion will make clearer the point of this approach to republicanism and the Guarantee Clause: By refocusing energy to give Congress some powers under the Clause, progressives can send a much stronger message to the courts to discover and manage a Guarantee Clause jurisprudence. To be sure, many may be disappointed by some of the results; but at least we’ll achieve justiciability, and a limited power for legislatures to define republicanism and what it requires.

II. REPUBLICANISM’S DISCONTENT

Republicanism’s greatest embarrassment—but what may be one of its greatest assets—is its incapacity to settle on a consistent agenda. Cass Sunstein was honest about the project of the republican revival from the outset: “The task for modern republicanism is not . . . one of excavation. Contemporary republicanism is more to be made than found, even if historical commitments can illuminate, in somewhat surprising ways, the nature of American constitutionalism at its

26. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

inception.”²⁷ What started as a project inspired by the school of historiography,²⁸ became—when appropriated by legal scavengers—a flourishing field that owed surprisingly little to historical accounts of what republicanism meant at the Founding. This led to a series of complaints. H. Jefferson Powell notes:

Modern republicanism, it seems, is interested only in those parts of the language of the past that it can appropriate. Professor Sunstein does not offer us historical republicanism and commend its virtues to us; he offers us a contemporary political theory and notes that at times the founders said similar things.²⁹

But this is hardly something to be ashamed of; it is in the very nature of republicanism to contest what republicanism requires, to “alter and abolish” meanings, as *The Federalist’s* authors had it. Michelman suggests that republicanism’s “expression of . . . American constitutionalism’s problematic and dynamic core [is] its endless interplay between the principles of legality (entailing respect for historical commitment) and self-government (entailing respect for the human capacity for self-renewal).”³⁰ One of republicanism’s legacies, then, is its commitment to change its own self-description.

This progressive packaging shouldn’t be read to downplay republicanism’s roots in a classical tradition that is downright offensive to many who celebrate the revival of republican discourse. Linda Kerber warns enthusiasts: “Patriarchy was comfortably compatible

27. Sunstein, *supra* n. 2, at 1589.

28. The central texts of this school include: Joyce Appleby, *Capitalism and a New Social Order: The Republican Vision of the 1790’s* (N.Y.U. Press 1984); Bernard Bailyn, *The Central Themes of the American Revolution: An Interpretation in Essays on the American Revolution* 3 (Stephen G. Kurtz & James H. Hutson eds., 1973); Bernard Bailyn, *The Ideological Origins of the American Revolution* (Harv. U. Press 1967); Thomas L. Pangle, *The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of Locke* (U. Chi. Press 1988) (discussing the history and future of republicanism, and its plasticity); J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton U. Press 1975) (discussing the revival of republicanism in Puritan England); Robert Shalhope, *Republicanism and Early American Historiography*, 39 Wm. & Mary Q. 334 (1982); Robert Shalhope, *Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography*, 29 Wm. & Mary Q. 49 (1972); Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (U.N.C. Press 1969).

29. H. Jefferson Powell, *Reviving Republicanism*, 97 Yale L. J. 1703, 1707 (1988).

30. Michelman, *supra* n. 2, at 1518.

with classical republicanism Slavery, too, was comfortably compatible with classical republicanism, and for many of the same reasons.”³¹ But even Sunstein acknowledges that “[v]arious strategies of exclusion . . . were built into the republican tradition. The republican belief in deliberation about the common good was closely tied to these practices of exclusion; it cannot be neatly separated from them.”³² Neo-republicanism’s proponents knew that they were up against an oftentimes unflattering history, but still felt that the ideology could be recruited for very important purposes.

A. DELIBERATION

As discussed in the Introduction, among the most central of these purposes was the belief in deliberation. Consider de Tocqueville:

What is meant by “republic” in the United States is the slow and quiet action of society upon itself. It is an orderly state really founded on the enlightened will of the people. It is a conciliatory government under which resolutions have time to ripen, being discussed with deliberation and executed only when mature.³³

The centrality of deliberation for neo-republicans, however, “is aspirational and critical rather than celebratory and descriptive. It is a basis for evaluating political practices.”³⁴ By assessing the degree to which a policy is derived from deliberative procedures, republicans purport to be able to pass judgment on the legitimacy of governmental action. Largely in response to what they find repugnant in the interest-group pluralist tradition, republicans “attempt to design political institutions that promote discussion and debate among the citizenry; they will be hostile to systems that promote lawmaking as ‘deals’ or bargains among self-interested private groups; they may well attempt to insulate political actors from private pressure.”³⁵ This is generally

31. Linda K. Kerber, *The Republican Civil Tradition: Making Republicanism Useful*, 97 Yale L. J. 1663, 1668 (1988).

32. Sunstein, *supra* n. 2, at 1539.

33. Alexis de Tocqueville, *Democracy in America* 395 (J. P. Mayer ed., George Lawrence trans., Doubleday 1969).

34. Sunstein, *supra* n. 2, at 1549; *but see* Frickey & Smith, *supra* n. 12 (arguing that it cannot be a basis for evaluating political practices).

35. Sunstein, *supra* n. 2, at 1549; *see* Michelman, *supra* n. 2, at 1507-08; *but see* Richard A. Epstein, *Modern Republicanism—Or the Flight from Substance*, 97 Yale L. J. 1633, 1636-39 (1988); Ethan J. Leib, *Towards a Practice of Deliberative*

accomplished with an impulse in republicanism to sing the praises of participatory democracy.³⁶ By increasing the number of participants, government can be more responsive to popular demands, and not pay attention merely to powerful private interests.

While deliberation and participation are their primary procedural concerns, neo-republicans have some substantive concerns as well. The trouble with focusing on such matters is that—as Kerber has observed—“ ‘Republicanism’ has become so all-embracing as to absorb comfortably its own contradictions.”³⁷ Nonetheless, there are some themes that recur often enough to associate them with the “essence” of republicanism, notwithstanding the fact that “[t]o insist on the ‘essence’ of republicanism ha[s] the effect of driving the term *republican* into the realm of metaphor and uncertainty, making it vulnerable to a host of alternate and conflicting definitions.”³⁸ Kerber continues to suggest that such reification of the term renders it “available to signify almost anything so long as it was nonmonarchical.”³⁹ But in the years following the revival, a broad array of substantive norms can be traced, in the literature, rendering the ideology more determinate—and perhaps more progressive—than its classical formulation.

B. POPULAR SOVEREIGNTY AND ITS DEMOCRATIC EGALITARIANISM

For Akhil Amar, the “central pillar of [r]epublican [g]overnment . . . is popular sovereignty.”⁴⁰ Amar believes such a redescription absorbs the concepts of majoritarian rule and

Democracy: A Proposal for a Popular Branch, 33 Rutgers L.J. 359 (2002) (attempting to fill the gap). It should be noted that very few institutional design projects emerge from the theoretical enterprise.

36. See e.g. Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age* xiv (U. Cal. Press 1984); Jane J. Mansbridge, *Beyond Adversary Democracy* 3 (Basic Books 1980); see generally Carole Pateman, *Participation and Democratic Theory* (Cambridge U. Press 1970) (discussing recent theories of democracy and trends toward democratic self-management in industry).

37. Linda K. Kerber, *The Republican Ideology of the Revolutionary Generation*, 37 Am. Q. 474, 480 (1985).

38. *Id.* at 477.

39. *Id.*

40. Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. Colo. L. Rev. 749, 749 (1994).

representative democracy into the idea of republicanism. His argument draws upon *The Federalist* to show that “republican government was regularly contradistinguished from monarchy and aristocracy, but rarely from democracy,” indicating that republicanism carries with it some properties of majoritarian and representative democracy.⁴¹ Indeed, the guarantee of a republican form of government explicitly was meant to give the “superintending government” the “authority to defend the system against aristocratic or monarchical innovations.”⁴² Republican government, on the *Federalist* model, is “a government which derives all its powers directly or indirectly from the great body of the people . . . not from an inconsiderable proportion, or a favored class of it.”⁴³ Madison further proved “the republican complexion” of the Constitution in a “decisive” fashion, noting the “absolute prohibition of titles of nobility, both under the federal and the State governments.”⁴⁴ These Madisonian pronouncements lend credibility to Amar’s popular sovereignty thesis.

Moreover, Amar sees in republicanism a certain flexibility, suggesting that “[r]epublican government probably does not (as some have claimed) prohibit all forms of direct democracy, such as initiative and referendum, but neither does it require ordinary lawmaking via these direct populist mechanisms.”⁴⁵ This flexibility makes the theory fit “quite snugly” with modern practices of mixing direct and representative democracy,⁴⁶ and therefore, has immediate appeal for those pointing to neo-republicanism as a descriptive account of our mixed regime.⁴⁷

But the inherent vagueness of the term republicanism is not aided by the equally vague notion of popular sovereignty: In republicanism,

41. *Id.* at 758.

42. James Madison, *The Federalist No. XLIII*, *supra* n. 19, at vol. I, 294, 297.

43. James Madison, *The Federalist No. XXXIX*, *supra* n. 19, vol. I, 257.

44. *Id.* at 259.

45. Amar, *supra* n. 40, at 749.

46. *Id.* at 762. It is notable that Amar is seemingly more interested in a republicanism that is a “snug fit” with his theory about the Bill of Rights, than with democracy itself. See generally Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (Yale U. Press 1998) (arguing that the Bill of Rights’ present interpretation owes more to the Reconstruction era than the Founding).

47. Amar, *supra* n. 40, at 758 (claiming that “other leading Framers seemed explicitly to say that republican government could be *either* directly or indirectly democratic”). But his emphasis on democracy surely seems overblown.

as in popular sovereignty, scholars are always interested in—and receive little guidance to figure out—just who the relevant “we the people” are who should rule or be represented. Thus, for those who want to look to republicanism for normative grounding, Amar proffers little to specify its substantive norms.

Even as an historical account, Amar’s theses are overstated. It is beyond dispute that classical republicanism’s main strain was aristocratic, and that the Framers inherited much of this orientation. Charles Pinckney thought the president should be very wealthy, and it was quite common to have an anti-popular thrust to political thinking at the Founding.⁴⁸ Only William Few of Georgia represented the lower class at the Constitutional Convention.⁴⁹ Hamilton “candidly disdained the people.”⁵⁰ And although George Mason and James Madison appealed to the genius of the people,⁵¹ Jeremy Belknap noted, “[l]et it stand as a principle that government originates from the people; but let the people be taught . . . that they are not fit to govern themselves.”⁵² These proclivities led republicanism to be associated primarily with representative government. In the most authoritative statement by Madison, a republic is defined as “a government in which the scheme of representation takes place.”⁵³ Amar’s feeble attempt to discredit the Madisonian definition by emphasizing Madison’s hesitance,⁵⁴ supposedly embodied in the words “by which *I* mean,”⁵⁵ borders on the absurd. Madison uses this type of locution two other times in the very *Federalist X* to which Amar turns for support. In his discussion of “pure democracy,”⁵⁶ Madison uses the refrain “by which *I* mean;”⁵⁷ and in defining “faction,”⁵⁸ he writes, “[b]y a faction *I*

48. Richard Hofstadter, *The American Political Tradition and the Men Who Made It* 4 (Alfred A. Knopf 1989).

49. *Id.* at 5.

50. *Id.* (Notice too that no one thought that the more populist house, the House of Representative, should have income ceilings, over which members were thought too rich to truly represent their constituents).

51. *Id.* at 6-7.

52. *Id.* (quoting an un-cited letter from New England clergyman Jeremy Belknap to a friend).

53. Madison, *The Federalist No. X*, *supra* n. 19, at vol. 1, 67.

54. Amar, *supra* n. 40, at 757.

55. Madison, *The Federalist No. X*, *supra* n. 19, at vol. 1, 67.

56. *Id.*

57. *Id.*

understand”⁵⁹ In neither of these other cases is there a hint that Madison’s definition of these concepts was idiosyncratic, and there is no reason to suggest that is the case with his definition of republicanism.⁶⁰

It would be hard to deny that “[r]epublicanism could be comfortably congruent with aristocracy; it certainly was expected that the citizen had enough property to free himself to find his fulfillment in serving the public good.”⁶¹ After all, as scholars have urged:

Historically, the granting of the franchise has been contingent on the freehold. Individuals not having the luxury of material independence have been viewed as “corrupt”; because such individuals are subject to the will of another for existence, republican theory has held them to be incapable of abstracted, normative reason.⁶²

It suffices for Michelman (and Amar) that “Madison and his fellow federalists ‘agreed, explicitly, that the people could create, alter, or abolish their government whenever they chose to do so,’ and that they did so by way of concession to the country’s prevailing democratic-republican sentiment.”⁶³ But even Michelman cites Professor Miller, who argues that this concession was rhetorical at best, an argument that goes a long way toward undermining Amar’s position. Michelman, invoking Miller, continues:

[F]or the acts of “the people” to be valid, they had to act all at once and together. Thus the Federalists rendered the democratic vocabulary of popular sovereignty harmless by invoking a fictitious people who could not possibly act together. The Federalists ascribed all power to a mythical entity that could never

58. *Id.* at 63.

59. *Id.*

60. *But see* M.N.S. Sellers, *American Republicanism* 151 (N.Y.U. Press 1994) (noting that John Adams observed that using republic to mean representative democracy is only “peculiar” to some English and French writers).

61. Kerber, *supra* n. 37, at 479 (citing Pocock, *supra* n. 28, at 507).

62. Derrick Bell & Preeta Bansal, *The Republican Revival and Racial Politics*, 97 Yale L. J. 1609, 1612 n.12 (1988) (citing J.G.A. Pocock, *Civic Humanism and Its Role in Anglo-American Thought in Politics, Language and Time: Essays on Political Thought and History* 80, 87-89 (U. Chi. Press 1989)).

63. Michelman, *supra* n. 2, at 1537 n.23.

meet, never deliberate, never take action. The body politic became a ghost.⁶⁴

It was not accidental that the class of persons whose deliberations were worth heeding, was always confined.⁶⁵ The authors of *The Federalist*, while explicitly condemning nobility, condoned the nobility that republican government afforded them, even without titles of nobility.⁶⁶

This historical reality, however, never gets in the way of republicans making egalitarian pronouncements. Consider Sunstein: "Dramatic differences in wealth and power are . . . inconsistent with the underlying premises of a republican polity. Montesquieu was particularly insistent on this point, envisioning equality as a necessary precondition for republicanism."⁶⁷ But at least Sunstein is clear that history is not univocal; and that while neo-republicanism aspires to some redistributive programs, such an orientation is best seen as something to make for history, not find therein.

C. THE VIRTUE OF COMMON GOODS

M.N.S. Sellers believes that popular sovereignty is a value posterior to what is central about republicanism. "Republicanism came first: [T]he idea that government exists for the common good of the people. Popular sovereignty followed, as the best test of the public good."⁶⁸ Although noting rather typically that the term "continue[s]" to attract new meanings, in pursuit of various legal and political goals,⁶⁹ Sellers draws our attention to a primary good of the republicans; they inherit from Montesquieu the instinct to prize self-sacrificing virtue and glorify civic participation used in service of the common good.⁷⁰ This "Common Good Thesis," as Amar calls it, is defined by

64. *Id.* (citing Joshua Miller, *The Ghostly Body Politic: The Federalist Papers and Popular Sovereignty*, 16 Pol. Theory 99, 104 (1988)).

65. Sunstein, *supra* n. 2, at 1590 n. 109.

66. Pangle, *supra* n. 28, at 124.

67. Sunstein, *supra* n. 2, at 1552 (citing Charles-Louis de Secondat Montesquieu, *The Spirit of the Laws* vol. 1, 43-45 (J.V. Pritchard ed., Thomas Nugent, trans., Rothman & Co. 1991)).

68. Sellers, *supra* n. 7, at 99.

69. *Id.*

70. *Id.* at 99-100; see Charles-Louis de Secondat Montesquieu, *The Spirit of Laws* 43-47 (J.V. Pritchard ed., Thomas Nugent trans., Rothman & Co. 1991).

republicanism's aim that "virtuous citizens be willing to make sacrifices for the greater common good."⁷¹ By emphasizing that republicanism historically favored such a commitment to the common good, neo-republicans could assert that "clauses of the United States Constitution exist, on this argument, largely to prevent private interests from exercising undue influence on public policy."⁷² It is clearly part of republicanism's rhetoric to encompass "terms such as 'the common good,' . . . and 'public-regarding' activity."⁷³

Of course, as with many of the other substantive norms of republicanism, just what is to count as a public good is largely indeterminate: "As Gordon Wood has observed, under this definition, it would even be possible for a hereditary monarchy to be a republic, if its citizens possessed the proper self-sacrificing, virtuous spirit."⁷⁴ Although some have argued that the Federalists specifically departed from this inheritance of republicanism's definition from Montesquieu,⁷⁵ the rhetoric of the common good may be viewed as useful, even if indeterminate.⁷⁶

D. STRUCTURAL PREFERENCES

Though republicanism appears consistent with non-democratic regimes at the level of theory, neo-republicanism embeds within its preferences specific governmental structures, articulated neatly by Sellers. When listing his "catalogue" of republican virtues, he prioritizes:

- (1) [P]ursuit of the common good through[;] (2) popular sovereignty . . . ; (3) the rule of law, under[;] (4) a mixed and balanced government, comprising[;] (5) a deliberative senate[;] (6) an elected executive[;] and[,] (7) a popular assembly or representative lower house in the legislature.⁷⁷

71. Amar, *supra* n. 40, at 759.

72. Sellers, *supra* n. 7, at 117 (citing Sunstein, *supra* n. 21, at 1683-732).

73. White, *supra* n. 3, at 21.

74. Amar, *supra* n. 40, at 759 (citing Wood, *supra* n. 28, at 49, 205-06).

75. E.g. David Epstein, *The Political Theory of the Federalist* 124 (U. Chi. Press 1984).

76. See Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* 146 (2d ed., U. Notre Dame Press 1981) (arguing that these common goods are quite determinate despite radical moral disagreement).

77. Sellers, *supra* n. 7, at 99 (citing Sellers, *supra* n. 60, at 6, 245).

His placement of the institutional structures toward the bottom of the list might be unfortunate. Such a ranking downplays the role of governmental organization; a different mode of ordering the virtues would highlight the fact that four of seven are institutional and determinate, while the other three are so abstract as to stand for virtually anything.

However, Sellers' depiction is, of course, distinctly (and intentionally) American, and the revivalists (while particularly sensitive to the American political scene) hardly want to be so parochial as to insist on the particular separation and balance of powers the American Constitution devised. Some parliamentary regimes—even those without judicial review—must embody the substantive norms of the ideology. Thus such a perspective would render revivalists narrow-minded, with too much fixation on particular organizational norms.⁷⁸

That said, there is something to Sellers' articulation. Modern republicans like mixed regimes to balance power, even if they ultimately spend too much time tailoring their theories for judicial and popular implementation. They like to imagine a deliberative body making policy decisions, even if they are so skeptical of deliberation at the legislative level that they look to enforce such deliberation from without.⁷⁹ Furthermore, they like to include some degree of popular input by romanticizing the electoral process, even if they suspect that high degrees of voter ignorance cast a cloud of illegitimacy over all electoral politics.⁸⁰ Republicans want to take up projects of institutional design, because they see a necessary relation between the health of a polity and its institutional integrity.⁸¹ Nevertheless, they will of course, differ on just what kinds of institutional reforms are needed, and different republics will need different institutions, owing to their entrenched cultural norms.

78. As we shall see *infra* notes 141-61 and accompanying text, the focus on the judiciary is a symptom of this pathology.

79. *E.g.* Redish, *Federal Courts*, *supra* n. 23, at 24-25.

80. *E.g.* Epstein, *supra* n. 75, at 22-26.

81. *E.g.* Pettit, *supra* n. 10, at 271-81.

E. *NON-DOMINATION*

One of the more recent attempts to spell out a theory of what is central to republicanism can be found in Philip Pettit's *Republicanism*. He is quite hopeful about this theory's broad appeal, stating:

Republican theory should recommend itself to all competitors, I believe, in the axiom from which it starts. The republican conception of liberty should appeal to liberals, in so far as it focuses on people's individual power of choice and thus has much in common with the negative notion of freedom as non-interference. And it should appeal to populists in so far as it requires . . . that non-dominating government has to track the interests and ideas of ordinary people; this is the idea that lies behind the positive, populist notion of freedom as democratic self-mastery.⁸²

For Pettit, the ideal of non-domination is what holds republicanism together and is the prerequisite for the public participation it valorizes.⁸³ The ideal "requires that no one is able to interfere on an arbitrary basis—at their pleasure—in the choices of a free person."⁸⁴ What this means is that more than—and perhaps slightly less than—people's first order freedoms are protected. "[D]omination in the sense defined may occur without actual interference: [I]t requires only the *capacity* for interference; and interference may occur without any domination: [I]f the interference is not arbitrary then it will not dominate."⁸⁵ Pettit's hope is that such non-domination will lead to autonomy for all citizens in a republican regime.⁸⁶ He is again hopeful about this project because he believes that "most people are naturally responsive to legitimate demands."⁸⁷ Pettit explains:

When someone enjoys non-domination that will usually be a matter of common knowledge among relevant parties, so that non-

82. *Id.* at 11.

83. *Id.* Unfortunately, many have severed the means of non-domination and participation from the end it is supposed to serve. The result really is foreign to any faithful attempt to get republicanism right.

84. *Id.* at 271.

85. *Id.* at 272 (emphasis added).

86. *Id.*

87. *Id.* at 279. I'm not quite as optimistic.

domination has a subjective and intersubjective aspect: [I]t is associated with tranquillity, in Montesquieu's phrase, and with the ability to look others in the eye.⁸⁸

Although Pettit never cites Catherine MacKinnon, his non-domination approach bears some resemblance to her approach toward Equal Protection jurisprudence and its sensitivity to domination.⁸⁹

Pettit capitalizes upon what Kerber already knows, that "[t]reating republicanism as a *cultural* as well as political phenomenon opens the way to evaluating" its import in different ways.⁹⁰ By using a term such as domination, with all of its cultural baggage, Pettit is able to extend republicanism's ambit into a sphere not directly political. Thus, his attention to republicanism's communitarianism is not accidental. "Freedom as non-domination is a communitarian good. It can be realized only under an arrangement involving people in communal interaction."⁹¹ By tying republicanism to its dependence on a contribution from civil society, Pettit adroitly disentangles the health of the polity from a pathologically monolithic obsession with governmental structures. Moreover, he is given an escape hatch to avoid focus on the judiciary, a problem that resurfaces in the republican revival time and again. That said, he probably doesn't give institutional design enough attention, leaving republicanism with little ammunition to establish its values.

The greatest disadvantage of Pettit's theory is its unbounded optimism. But it has a lot going for it that other contenders do not. First, it does not need to rely on any reading of the Federalists. Pettit isn't American, so he has no particular need to theorize from an

88. *Id.* at 273.

89. See Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* 40-43 (Harv. U. Press 1988) [hereinafter MacKinnon, *Feminism*]; Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* 102 (Yale U. Press 1986). Of course, MacKinnon and Pettit take aim at different targets and the opposites of their theories are quite different. MacKinnon wants to overcome the "difference approach" to gender inequalities and Pettit wants to overcome "negative" liberty's hold on the liberal imagination. MacKinnon, *Feminism*, at 33; Pettit, *supra* n. 10, at 27. Yet, they end up with a similar result, and it is quite surprising for Pettit, throughout his book, to ignore a central theorist of domination.

90. Kerber, *supra* n. 37, at 482-83 (paying particular attention to the cultural effect of republicanism upon women). White suggests that this "cultural turn" was endemic to the republican revival. White, *supra* n. 3, at 10.

91. Pettit, *supra* n. 10, at 275.

American foundation.⁹² This is helpful if only because it does away with the constraint of being answerable to history and allows him to focus primarily on what republicanism can do for us today. Sunstein and Michelman had progressive hopes too, but felt the need to show republicanism's continuity with the story that was being told about it in the historical literature.⁹³

Another great advantage of Pettit's version is its explicitly open-textured quality. As he suggests, "republicanism is a research [program] for policy-making, not a once-for-always blueprint."⁹⁴ In his emphasis on non-domination, Pettit makes clear that "the important thing to ensure is that governmental doings are fit to survive popular contestation."⁹⁵ His substantive norm, then, translates into a more proceduralist agenda. "This contestatory conception of democracy has priority over the accounts given of likely republican aims, and likely constitutionalist constraints, in the sense that those accounts should be seen as outlines of what is likely to pass muster in a contestatory democracy."⁹⁶ By making explicit that "on any plausible republican view, preferred policy should be implemented by the state only in ways that conform to preferred process," Pettit lets us see virtually all of republicanism's substantive norms as emerging from contestation, and for that very reason open to change.

Contestation, as part of the deliberative process, relies on certain *intellectual virtues*, with which republicanism has historically been linked. Pettit, without exploring this tradition explicitly, makes overtures to republicanism's "foregrounding of reason," in contradistinction to the "backgrounded" reason of interest-group pluralism.⁹⁷ Though we'll have to leave the investigation of Reason for another time, it suffices to use this opportunity to transition into a more general discussion of republicanism's consistent orientation toward the inculcation of the intellectual virtues.

92. Of course, if he stays in the States too long, all that might change; but I imagine Brian Barry, Maurizio Viroli, and Jeremy Waldron will encourage him not to give in to the temptation.

93. See Michelman, *supra* n. 2, at 1494-95; Sunstein, *supra* n. 2, at 1535-40.

94. Pettit, *supra* n. 10, at 276.

95. *Id.* at 277.

96. *Id.* at 278.

97. *Id.*

F. *THE INTELLECTUAL VIRTUES*

Given republicanism's emphasis on certain capacities to facilitate deliberative outcomes, it should not be surprising that there are qualities of mind and character that republicanism must insist upon for proper effectuation. Although such attention to intellectual virtues can be seen as snobby and elitist, neo-republicanism has nonetheless embraced this aspiration—albeit dressed in more populist garb. Even Madison and Mason appealed to the *genius* of the people.⁹⁸ Thomas Pangle puts it this way: “Wherever the genuine classical republican tradition still lives, there is some agreement as to the supreme value of the intellectual virtues, and of a life spent in leisured meditation on the nature of justice, the soul, and divinity.”⁹⁹ Although we have all moved past the classical form, there is surely a heritage that lives on in the modern incarnation.

Of the recent attempts to show revolutionary America as committed to an “informed citizenry,” Richard Brown’s is the most prominent.¹⁰⁰ He notes that an “uncensored, competitive press, a nationally subsidized postal service and transportation networks . . . are all founded on the belief that America must have an informed citizenry.”¹⁰¹ By emphasizing the extent to which such priorities surfaced at the Founding, Brown is able to highlight the organizing theme of such priorities. In particular, he argues that the enshrined First Amendment rights to free speech and a free press were aimed at inculcating an informed citizenry to avoid the problems of other republics;¹⁰² the Framers were aware that other republics had not been durable. Brown hypothesizes that an informed citizenry would combat that insecurity, and that the formula for American republicanism included such intellectual aspirations.¹⁰³

Brown notes that in the minds of the framers, the “age of reading” was to ensure the goodness of the republic.¹⁰⁴ Madison wanted to keep

98. For further discussion of Madison and Mason, see *supra* notes 51-60, and accompanying text.

99. Pangle, *supra* n. 28, at 61.

100. See Richard D. Brown, *The Strength of a People: The Idea of an Informed Citizenry in America, 1650-1870* xi (U.N.C. Press 1996).

101. *Id.* at xvi.

102. *Id.* at 85-86.

103. *Id.*

104. *Id.* at 115.

postal rates—at least for newspapers—low, “since anything ‘above half a cent, amounted to a prohibition . . . of the distribution of knowledge and information.’”¹⁰⁵ Jefferson wanted no juror or voter to be certified without having shown proficiency in reading, writing, and arithmetic.¹⁰⁶ Furthermore, “a Vermont Jeffersonian had tersely explained that ‘knowledge is the standing army of republics.’”¹⁰⁷ Even the Anti-federalist governor of New York, George Clinton,¹⁰⁸ urged in 1792 that “the diffusion of knowledge is essential to the promotion of virtue and preservation of liberty.”¹⁰⁹

In service of this goal of an informed citizenry, many state constitutions and bills of rights enshrined the virtues of public education.¹¹⁰ Although even *Brown v. Board of Education* did not put a similar commitment to public education into the federal system,¹¹¹ the general hope for the broad inculcation of the intellectual virtues was very much part of the debates at the Founding. Led by Madison and Pinckney, the Framers almost wrote a Federal University into the Constitution.¹¹² Ben Rush took up the argument: “[I]n this

105. *Id.* at 91 (citing *Papers of James Madison (Congressional)* vol. 14, 186 (Robert A. Rutland & Thomas A. Mason eds., U. of Va. Press 1983)).

106. *Id.* at 94.

107. *Id.* at 117 (citing O.C. Merrill, *The Happiness of America: An Oration Delivered at Shaftesbury, Vermont* 13 (1804)).

108. Compare Wood, *supra* n. 28, at 499-500 (finding the Anti-federalists to be the main proponents of classical republicanism) with Kerber, *supra* n. 31, at 1666. Kerber provides a corrective, stating:

The entire revolutionary generation, both Federalists and Antifederalists, were heirs of the classical republican tradition. If there is much in Antifederalist ideology which conveys the republican tradition—especially its emphasis on small scale politics and intense citizen participation—there is also a great deal, perhaps even more, in Federalist ideology which also embodies republican tradition, including an intense consciousness of the fragility of republics, of the natural inequality of the social classes, and of the threat to virtue posed by ambition, luxury and lust.

Id.

109. Brown, *supra* n. 100, at 103-04.

110. *Id.* at 85-86; see *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 392 (Tx. 1989) (finding the state constitution to require better allocation of state educational resources to the poor, thus providing what the federal constitution cannot); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 4-6 (1973).

111. 347 U.S. 483 (1954).

112. Pangle, *supra* n. 28, at 76 (citing *The Records of the Federal Convention of 1787* 321-22, 325, 616, 620 (Max Farrand ed., Yale U. Press 1966)).

University . . . prepare our youth for civil and public life.”¹¹³ Thus, students should study political science first and foremost. Jefferson jumped aboard with Washington and Madison, but then focused his energy primarily on the state outlet, the University of Virginia. Jefferson, in his *Preamble to a Bill for the More General Diffusion of Knowledge*, wrote:

[I]t becomes expedient for promoting the public happiness that those persons, whom nature hath endowed with genius and virtue, should be rendered by liberal education worthy to receive, and able to guard the sacred deposit of the rights and liberties of their fellow citizens.¹¹⁴

George Washington was also willing to commit his own cash to the national university:

Wartime experience had convinced Washington that mixing together “young men from different parts of the United States” caused them to shed “those jealousies and prejudices[,] which one part of the Union had imbibed against another part.”¹¹⁵

Nevertheless, no explicit guarantee of public education (or commitment to diversity for its capacity to shed prejudice) was ever inscribed into the document—but they did ultimately agree to guarantee a republican form of government, which was simply unimaginable without education.

In looking more closely at Jefferson’s articulation, we can easily see that education was *not* important because it could impart to just anyone the intellectual virtues, or because it could provide a mechanism for social mobility. One needed to be predisposed—or “habituated,” as Aristotle has been translated—to leadership and intellectuality to make an education worth the investment. The national university was to be a breeding ground for those from the political class. Nevertheless, the historical commitment to education is one that still provides modern republicans with pride.

113. *Id.* (citing *American Higher Education: A Documentary History* 152-57 (Richard Hofstadter & Wilson Smith eds., U. Chi. Press 1961)).

114. *Id.* at 77 (citing Philip B. Kurland & Ralph Lerner, *The Founders' Constitution* 672 (U. Chi. Press 1986)).

115. Brown, *supra* n. 100, at 95 (citing George Washington, *Writings of George Washington* vol. 35, 199 (John C. Fitzpatrick ed., Govt. Printing Off. 1940)).

One of the underlying purposes of education was to have reason take its proper place in politics. "It is the reason, alone, of the public, that ought to control and regulate the government."¹¹⁶ By using education to help people control their passions, republicans facilitate their pursuit of public reason. Again emergent from its orientation toward establishing a deliberative democracy, modern republicanism stresses the need to allow reason instead of mere interests to capture political processes. Republicanism takes aim at pluralism—"the deep mistrust of people's capacities to communicate *persuasively* to one another their diverse normative experiences: [O]f needs and rights, values and interests, and, more broadly, interpretations of the world."¹¹⁷ By valuing persuasion, and the habituation toward it that education can provide, the republican revival "reasserts the value of reason in politics."¹¹⁸

But approaches to reason can go one of two ways: Rationality can be based in consensus or in conflict. The better reading of neo-republicanism must take note of its central commitment to contestation and explicating this feature will take us to the end of our crash course in modern theories of republicanism.

G. SUMMING UP: DEMOCRACY AND DISAGREEMENT

Whether or not Wood is right that John Adams' memory served him badly in later years, Adams is on record as claiming that he "never understood" what a republic was, and that "no man ever did or will."¹¹⁹ Modern republicans have divergent ideas about what republicanism means, although I have tried to provide a typology of some of the dominant components of the commitment. Clearly, my typology is not exhaustive. A fuller account would treat republicanism's relationship to soldiering, emphasizing how the suffrage was extended to blacks and women as they were given military responsibilities.¹²⁰ It might link republicanism to theories of workplace democracy.¹²¹ It might

116. James Madison, *The Federalist No. XLIX*, *supra* n. 19, at vol. II, 344, 348.

117. Michelman, *supra* n. 2, at 1507.

118. Sellers, *supra* n. 7, at 117.

119. Wood, *supra* n. 28, at 48.

120. See Amar, *supra* n. 40, at 771-72 (citing Pocock, *supra* n. 28, at 88-90, 390, 401-22).

121. See e.g. Robert Dahl, *A Preface to Economic Democracy* 68-70 (U. Cal. Press 1985); Edward S. Greenberg, *Workplace Democracy: The Political Effects of*

explore just how important it was for women to live under a republic, rather than another form of government.¹²² It would very likely need to trace republicanism's relationship to religion.¹²³ Even in Sunstein's rather secular exposition, he notes that republicanism should help "[i]nterpretations of the [E]stablishment [C]ause . . . recognize the role of religious organizations in the cultivation of republican virtues; approaches to the clause that end up disfavoring religion undervalue the role of intermediate organizations in a pluralistic society."¹²⁴ Surely, there are also those who think neo-republicanism should take a much more suspicious view of religion.¹²⁵ However, all these contestable themes further buttress the sort of story I have spent this Part telling—that the important version of republicanism to retain is its contestatory spirit of redescription and renewal, its gesture towards history without feeling constrained by the historical, and its commitment to reason-giving.

Pettit casts republicanism in this light: "It supports an exciting way of rethinking democratic institutions, in which the notion of consent is displaced by that of contestability."¹²⁶ Republicanism is combative: It seems to prefer agonistic contestation to consensus. Although White tries to argue that "[r]epublicanism, as a historiographic perspective, rejects both 'conflict' and 'consensus' as explanatory motifs,"¹²⁷ he clearly recognizes republican scholarship as an alternative to both Hartzian liberalism by "de-emphasizing the uniqueness and continuity of American ideas and institutions" and Beardian progressivism, by "restoring ideas to a position of independent causal significance."¹²⁸ Hartz was worried exactly about

Participation 169-71 (Cornell U. Press 1986); Christopher Eaton Gunn, *Workers' Self-Management in the United States* 193 (Cornell U. Press 1984).

122. See Kerber, *supra* n. 37, at 482-83 (citing Montesquieu, *supra* n. 70; Charles-Louis de Secondat Montesquieu, *The Persian Letters* (John Ozell, trans., Garland Publ. 1972), and arguing that "it made a substantial difference to women whether or not they lived under a republican form of government").

123. See Pangle, *supra* n. 28, at 198.

124. Sunstein, *supra* n. 2, at 1578; see Brown, *supra* n. 100, at 99 (noting religion's centrality to republican government alongside education).

125. In general, we can expect the Reason-Worshippers to want to displace religion to the fullest extent possible without coming off as illiberal. In this regard, note the "liberal" reaction to *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

126. Pettit, *supra* n. 10, at 12.

127. White, *supra* n. 3, at 5.

128. *Id.* at 9.

the problems associated with aiming for political consensus: “I believe that this is the basic ethical problem of a liberal society: [N]ot the danger of the majority, which has been its conscious fear, but the danger of unanimity, which has slumbered unconsciously behind it: [T]he ‘tyranny of opinion’ that Tocqueville saw unfolding.”¹²⁹

By appreciating with the *Federalist* that the only solid basis for all our rights is “public opinion, and the general spirit of the people and the government,”¹³⁰ republicanism embraces the changeability of that opinion and spirit. Although virtue and intelligence are always central, what counts as constitutive of such features for the republicans is largely a matter of argument. Michelman is on to this from the beginning:

Neo-republicanism involves the ongoing revision of the normative histories that make political communities sources of contestable value and self-direction for their members. This tinkering entails not only the recognition but also the kind of re-cognition—reconception—of those histories that will always be needed to extend political community to persons in our midst who have as yet no stakes in “our” past because they had no access to it.¹³¹

While perhaps overstating the degree of contestation that a theory of republicanism can accommodate, Michelman surely sets the stage for a version of republicanism that is always being rewritten.

Sellers wrongly focuses on neo-republicanism’s commitment to Reason to find it a theory of consensus, aiming to swallow all perspectives into its vision of the common good.¹³² He ignores what Sunstein tries to emphasize: “Modern republicanism is thus not grounded in a belief in homogeneity; on the contrary, heterogeneity is necessary if republican systems are to work.”¹³³ Nonetheless, this rift between the antagonistic republicans who prize contestation, and the rationalist republicans who prize consensus, is still detectable in modern discussions of republicanism, as many deliberative democrats

129. Louis Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought Since the Revolution* 11 (Harcourt, Brace & World 1955).

130. Alexander Hamilton, *The Federalist No. LXXXIV*, *supra* n. 19, at vol. II, 152, 157.

131. Michelman, *supra* n. 2, at 1495.

132. See Sellers, *supra* n. 7, at 118; Sellers, *supra* n. 60, at 157.

133. Sunstein, *supra* n. 2, at 1576.

have absorbed Habermasian jargon,¹³⁴ and with it too much confidence in Reason's potential to be fully convincing.¹³⁵ Just as Hartz and Tocqueville recoiled at the tyranny of opinion,¹³⁶ so should republicans recoil at the tyranny of Reason and refuse to allow public reason to be dominated by one version of truth or good procedure. Sunstein, who oscillates back and forth defending at once consensus and contestation, basically gets it right: "The republican belief in agreement as a regulative ideal, and the republican conception of political truth, are pragmatic in character. They do not depend on a belief in ultimate foundations for political outcomes."¹³⁷ The appeal to pragmatism illuminates the contestatory drive of republicanism because pragmatism does not settle on a fixed notion of truth;¹³⁸ neither should republicans if they want republicanism to remain vital, relevant, and a source of legitimate political action. When Sellers calls republicanism "cultural self-expression through law,"¹³⁹ he is right only because

134. See e.g. Jürgen Habermas, *Between Facts and Norms* 4-5 (William Rehg ed., MIT Press 1996) (singing the praises of "communicative reason" and its capacity to ground rights, and the rule of law).

135. For thinkers who may be guilty of this proclivity to treat Reason as dispositive, see Bruce Ackerman, *Social Justice in the Liberal State* 4-7 (Yale U. Press 1980); Joshua Cohen, *Deliberation and Democratic Legitimacy* in *Deliberative Democracy: Essays on Reason and Politics* 67, 85 (James Bohman & William Rehg eds., MIT Press 1997); David Gauthier, *Public Reason*, 12 Soc. Phil. & Policy 19 (1995). It is important to remember that deliberative democracy has a life of its own and my comments about republicanism here shouldn't be read to be a serious treatment of the deliberative democracy literature, even if Jack Balkin is right that deliberative democracy is the "successor in interest" to the republican revival. See e-mail from Jack Balkin, Knight Prof. of Const. L. & First Amend., to Ethan J. Leib (Jan. 30, 2002) (copy on file with Whittier Law Review). For the author's approach to that literature, see Leib, *supra* note 35, at 408-27.

136. Hartz, *supra* n. 129, at 11; Tocqueville, *supra* n. 33, at 250-61.

137. Sunstein, *supra* n. 2, at 1554.

138. *Id.* 1554-55; see Richard Rorty, *Achieving Our Country: Leftist Thought in 20th Century America* (Harv. U. Press 1998) (Presenting a representative view of the agonistic-deliberative-democratic-pragmatist strain of republicanism I have been arguing for); Richard Rorty, *Truth and Progress: Philosophical Papers* vol. 3, 19-42 (Cambridge U. Press 1998); Richard Rorty, *Contingency, Irony, and Solidarity* 44-45 (Cambridge U. Press 1989). Interestingly, pragmatism is having its own more recent revival, and this may reinvigorate the republican revival, allowing it to careen in new directions. See *The Revival of Pragmatism: New Essays on Social Thought, Law, and Culture* (Morris Dickstein ed., Duke U. Press 1998).

139. Sellers, *supra* n. 7, at 99 (citing M.J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 William & Mary L. Rev. 57, 73 (1973)).

republicanism recognizes that both culture and our modes of expressing it must change over time precisely through contesting the meanings of that culture, that expression, and those laws. The central concern of the next Part is the consideration of just who should be doing the contesting.

III. THE HERCULEAN WEAKNESS OF FOCUSING ON COURTS

I should make clear that this is not the place to talk exhaustively about why focusing on courts to concretize republican norms is a bad idea.¹⁴⁰ The primary purpose of this Part is instead to show that the republican revivalists do indeed focus upon the judiciary and that there is room for republicanism to aim for an alternative focus—one that can be useful at a time when arguments for judicial activism seem like the last thing progressives really need or want.

A. *THE COURT FETISH—AND ITS INDIGNITY*

Designing a mode of judicial review sympathetic to the revivalists' project became neo-republicans' primary agenda, probably because many lawyers are trained to convince judges, and because they were coping with a Reagan presidency and a Republican Congress. Moreover, since the theory counterpoises itself to interest-group pluralism, and since legislatures seem most guilty of this sin, the judiciary seems like it is well situated to function as a savior. By noting that "[i]n any representative democracy, there is simply too much slippage between legislative outcomes and constituent desires," Sunstein focuses republican energy on a different branch of government to effect the changes he thinks republicanism warrants, even though part of republicanism's thrust is fundamentally populist.¹⁴¹ "Not only are Sunstein's judicial proposals among his most fully developed, but even some of his non-judicial suggestions are implemented by judicial means."¹⁴² Michelman is no less monolithic

140. See Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 1-8 (U. Chi. Press 1991) (arguing that the strategy is ineffectual); Jeremy Rabkin, *Judicial Compulsions: How Public Law Distorts Public Policy* xi-xii, 112-14 (Basic Books 1989) (arguing that such an approach is harmful to the realization of the norms); Bickel, *Least Dangerous*, *supra* n. 24, at 16-23 (elaborating upon the "counter-majoritarian difficulty").

141. Sunstein, *supra* n. 2, at 1546-48.

142. Abrams, *supra* n. 1, at 1602.

in his focus: Presiding over his version of republicanism are the courts. "Michelman describes [the judicial branch] as 'assisting in the maintenance' of the popular dialogue; but in fact their role is more substantial."¹⁴³ To be sure, Sunstein now realizes that it may be better to stoke contestatory deliberation in the legislature, but he still uses the courts to get his deliberative democracy off the ground.¹⁴⁴

Paul Brest is also sensitive to this fixation: "Most radically—at least for legal scholars—we must abandon our obsession with courts and work toward the decentralization and democratization, not only of 'ordinary' politics, but of constitutional discourse and decision making itself."¹⁴⁵ He makes this claim because he recognizes, with Powell, that many arguments for deliberative politics "[sound] . . . very much like an argument for government by an independent judiciary, which is scarcely a program for broad political participation."¹⁴⁶ But Brest goes further towards helping us to be suspicious of such an independent judiciary recruited for its embodiment of the right sort of deliberation and contestation: "Much of the republican scholarship . . . seems to assume a naive view of judicial deliberations."¹⁴⁷

Because of the republican faith in judicial review, republicans expend a fair amount of energy on imagining specific judicial recommendations to bring about their ideal regime. Of their most interesting recommendations is a rethinking of rationality review, or minimal scrutiny.¹⁴⁸ Its classic formulation, the investigation of whether legislation bears a rational relation to a legitimate state

143. *Id.* at 1594 (citing Michelman, *supra* n. 2, at 1500).

144. Sunstein, *supra* n. 13, at 101 n. 8.

145. Brest, *supra* n. 8, at 1623.

146. Powell, *supra* n. 29, at 1708. (Remember that we rarely get a clean statement about whether participation is a means to or an end of republican government).

147. Brest, *supra* n. 8, at 1625 n. 14 (suggesting that a more skeptical view may be found in: Bob Woodward & Scott Armstrong, *The Brethren: Inside the Supreme Court* (Simon & Schuster 1979); Thurman Arnold, *Professor Hart's Theology*, 73 Harv. L. Rev. 1298 (1960); Paul Brest, *Interpretation and Interest*, 34 Stan. L. Rev. 765 (1982)); see generally Edward P. Lazarus, *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court* (Times Books 1998) (where the author, a former clerk for the United State Supreme Court, suggests that the environment at the Court is decidedly non-deliberative).

148. See Sunstein, *supra* n. 2, at 1576, 1579; Sunstein, *supra* n. 21, at 1695-1704; Cass Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 Sup. Ct. Rev. 127, 141-45; Cass Sunstein, *Interest Groups in American Public Law*, 38 Stan. L. Rev. 29, 85-86 (1985).

purpose, is utilized by republicans as amenable to a definition of rationality that requires deliberation by legislators.¹⁴⁹ But instead of thinking directly about how legislators can be encouraged to ignore “naked preferences,” republicans fixate on judicial policing. Though the approach ultimately emerges from a slightly different orientation,¹⁵⁰ the republicans basically have in mind a rationality review “with bite,” as they notice the Court occasionally doing a more exacting scrutiny of legislative action, even under the guise of a deferential rational-basis test.¹⁵¹ To be sure, such heightened rational-basis tests are generally triggered because of quasi-suspect classifications, so they probably have little in common with the sort of approach republicans endorse in their emphasis on procedural integrity. But republicans nevertheless see access to judicial decision-making, focusing their energy on trying to accomplish a form of judicial oversight of the political process.

Critics rightly emphasize that “[c]ivic republicans must . . . work to re-create a space for citizens and non-judicial institutions to participate in constitutional discourse and [decision making.]”¹⁵² But this recognition (or re-cognition?) never crystallizes into attention to the legislative process, mostly because in juxtaposing their orientation to interest-group pluralism, they are forced to be suspicious of representatives who, by and large, inevitably seem to act in accordance with the pluralist model. Brest writes that the space for citizens must be *re-created* “because there have been times during our history when constitutional discourse was not the near-exclusive domain of courts.”¹⁵³ But what the critics accomplish is largely a shift in attention to populism and civil society.

149. *E.g. Ry. Express Agency, Inc. v. N.Y.*, 336 U.S. 106, 115-17 (1949).

150. See Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 20-24 (1972).

151. See *U.S. Dept. Agric. v. Moreno*, 413 U.S. 528, 533-38 (1973) (applying rational-basis “with bite,” striking a policy aimed against hippies); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) (applying same as to the mentally retarded); *Romer v. Evans*, 517 U.S. 620, 635 (1996) (applying same as to homosexuals).

152. Brest, *supra* n. 8, at 1629.

153. *Id.* at 1629 n. 37. He recommends looking at “the debates over the constitutionality of slavery before the Civil War.” *Id.* Brest also makes overtures to congressional input without really fleshing out its relationship to republicanism, making his emphasis populism. *Id.* at 1624-25.

Without too much elaboration, it suffices to note that neo-republicans have started to intone the value of civic virtue, and have come to appreciate the role of popular institutions in entrenching their catalogue of virtues. The citations to Robert Putnam in the law reviews have mushroomed,¹⁵⁴ and the corrective to the judicial focus has fully taken hold. Even Pettit's highly theoretical approach to republicanism makes the claim that "if the republican state is to achieve its ends . . . it must connect with a form of civil society in which republican values are firmly entrenched: [I]t cannot expect to work such wonders on its own."¹⁵⁵ To be sure, this corrective is much needed and is immediately responsive to the critiques of Brest and Abrams: "By reassessing the role of substantive norms, and placing legislative participants as well as judges in our sights, we can reclaim the popular, collectivist strain of republican thought that has thus far eluded us."¹⁵⁶ But few ever really think about how republicanism can directly touch legislative participants. Jurisprudential theory, popular political institutional reform, and voluntary organizations seem accessible. Apparently, legislatures seem doomed to play out the pluralist nightmare until the end of days. Even Mark Tushnet, who urges us to take the Constitution away from the courts, argues for a "populist" constitutional law; the role of the legislature remains underdeveloped.¹⁵⁷

Jerry Mashaw understands acutely how this oversight occurs:¹⁵⁸ "Sunstein's argument has the . . . attraction of providing an alternative to the rather depressing interpretive paradigms recently proposed by scholars heavily influenced by the public choice literature of the past four decades."¹⁵⁹ Since republicanism is addressed to this literature, it

154. E.g. LexisNexis Group, *LexisNexis at Lexis.com* <<http://www.lexis.com>> (accessed on Oct. 17, 2002) (querying Robert Putnam produced 250 results); West Group, *Westlaw* <<http://www.westlaw.com>> (accessed on Oct. 17, 2002) (querying Robert Putnam produced 225 results); see e.g. Ethan J. Leib, Student Author, *On the Difficulty of Imagining an Aesthetic Politics*, 12 Yale J. L. & Human. 151, 155 n. 10 (2000) (where the author contributes to this overcorrection).

155. Pettit, *supra* n. 10, at 13.

156. Abrams, *supra* n. 1, at 1592-93.

157. Mark Tushnet, *Taking the Constitution away from the Courts* 9-32 (Princeton U. Press 1999).

158. See generally Jerry Mashaw, *As If Republican Interpretation*, 97 Yale L. J. 1685, 1688 (1988).

159. *Id.*

must take a cold approach to legislation. As stated for the public-choicers:

[T]he image of the legislature is the image of private contract. Legislation is but a set of “deals” between interest groups and re-election-oriented politicians. As such, it aggregates without synthesizing, it compels without expressing. Interpretation, on this view, is only the discernment of the precise degree to which state power has been aligned to private interests.¹⁶⁰

Primarily for these reasons, republicanism ignores legislatures.¹⁶¹

B. *THE DIGNITY OF LEGISLATION*

Jeremy Waldron argues for “the dignity of legislation.”¹⁶² He imagines statutes to be “held, implemented and enforced as *ours* in spite of our individual disagreements as to what it ought to be—by deliberation that stands credibly in the name of us all, deliberation that confronts our differences in public and settles on a common view as a matter of social choice.”¹⁶³ Of course, Waldron realizes that we will always experience “jurisprudential unease about legislation” because it is the “product of an *assembly*—the many, the multitude, the rabble (or their representatives).”¹⁶⁴ But he thinks we do legislation a disservice when we allow “a statute [to] thrust . . . itself before us as a low-bred parvenu, all surface and no depth, all power and no heritage.”¹⁶⁵

He argues that the degree of disrespect afforded to statutes and legislation is largely a creation of the more general fixation in legal theory upon the courts: “We paint legislation up in these lurid shades in order to lend credibility to the idea of judicial review . . . and to silence what would otherwise be our embarrassment about the

160. *Id.* at 1688-89 (citing Allan Hutchinson & Derek Morgan, *The Semiology of Statutes*, 21 Harv. J. Legis. 583 (1984); Richard Davies Parker, *The Past of Constitutional Theory—and Its Future*, 42 Ohio St. L.J. 223 (1981)).

161. For a review of how republicanism ignores legislatures, see *supra* note 13, and accompanying text. It is arguable that Sunstein’s view is nevertheless weighed down by its attention to how the courts are supposed to incite legislative deliberation.

162. Waldron, *supra* n. 11, at 1. Waldron believes that “legislation and legislatures have a bad name in legal and political philosophy, a name sufficiently disreputable to cast doubt on their credentials as respectable sources of law.” *Id.* at 1.

163. *Id.* at 89-90.

164. *Id.* at 31.

165. *Id.* at 10-11.

democratic or 'counter-majoritarian' difficulties."¹⁶⁶ These painters caricature statutes as unfortunate and ill-considered attempts at legal action in service of the public good.¹⁶⁷ Waldron even draws our attention to those that don't consider legislation to be in the genus "law."¹⁶⁸ When Langdell published a review of Albert Venn Dicey's *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century*, he noted that regardless the title, it was "in no sense a law book."¹⁶⁹ Langdell further noted, "[a]s commonly used by lawyers, the word means law as administered by courts of justice in suits between litigating parties, but here it is clearly not used in that sense, but in the sense of legislation."¹⁷⁰ Surely, these days, the view of legislation is not as bleak, but the republican revivalists do seem guilty of this exclusionary attitude.

Also, the republican penchant for contestation and deliberative disagreement is quite applicable to the particular view of legislation that Waldron propounds. Invoking Machiavelli, one of the patron saints of the republican tradition,¹⁷¹ Waldron reminds us:

Machiavelli warned us, almost five hundred years ago, not to be fooled into thinking that calmness and solemnity are the mark of a good polity, and noise and conflict a symptom of political pathology. "Good laws," he said, may arise "from those tumults that many inconsiderately damn."¹⁷²

With a full frontal attack on the consensus strain of republicanism, Waldron sees in legislation contestation that may effect

166. *Id.* at 2 (citing Bickel, *Least Dangerous*, *supra* n. 24, at 16).

167. See e.g. Guido Calabresi, *A Common Law for the Age of Statutes* 5-7 (Harv. U. Press 1982); S. E. Baldwin, *Two Centuries' Growth of American Law, 1701-1901* 4-5 (U. Press 1901).

168. Waldron, *supra* n. 11, at 1-2.

169. Christopher Columbus Langdell, *Dominant Opinions in England During the Nineteenth Century in Relation to Legislation, As Illustrated by English Legislation, or the Absence of It, During the Period*, 19 Harv. L. Rev. 151, 153 (1906) (emphasis added) (reviewing A.V. Dicey, *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century* (McMillan & Co. 1914)).

170. *Id.* at 151.

171. Hanna Fenichel Pitkin, *Fortune Is a Woman: Gender & Politics in the Thought of Niccolò Machiavelli* 4 (U. Cal. Press 1984) (describing Machiavelli as a "committed, lifelong republican").

172. Waldron, *supra* n. 11, at 34 (citing Niccolò Machiavelli, *Discourses on Livy* vol. 1, 16 (Harvey Mansfield & Nathan Tarcov trans., U. Chi. Press 1996)).

the sort of “deliberate change” Herbert Lionel Adolphus Hart hopes for in his concept of law.¹⁷³ While of course taking notice that Hart’s vision of deliberate change has been downplayed by modern theorists such as Joseph Raz (who is often concerned with the rule of recognition in courts and their capacity for norm-enforcement),¹⁷⁴ Waldron emphasizes the re-cognition that can take place in legislatures. Therefore, those who care about law emerging from deliberation—an overt goal of the neo-republicans—should pay more attention to legislatures, even if it sometimes seems *naïve* to trust them to contest authentically, whatever that may mean.

But to redescribe representatives as trustees, and not merely agents who must simply enact a slate of electoral preferences, a rubber bullet needs to be launched against the fetishization of majority rule. This faith in majorities can be detected in neo-republicans who spend too much time worrying about popular sovereignty.¹⁷⁵ Waldron has the ammunition waiting, drawing upon no less impressive republicans than Aristotle and Locke.¹⁷⁶ First, Waldron reminds us that there is nothing sacrosanct about the authority of the majority, arguing that:

[B]y itself the principle implies nothing about suffrage. The corrupt House of Commons, bought and sold by [eighteenth]-century English property-owners, used majority-decision For all we know, councils of terrorists use it for selecting their targets, when they disagree about who their next victims should be.¹⁷⁷

173. See *id.* at 14-15 (where Waldron comments about Hart in particular); see generally H. L. A. Hart, *The Concept of Law* (Oxford U. Press 1961).

174. E.g. Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* 280 n. 28 (Clarendon Press 1994).

175. E.g. Amar, *supra* n. 40, at 749.

176. To be sure, Locke is usually associated with the pluralist enemies of republicanism. See Charles Beard, *An Economic Interpretation of the United States Constitution* 73-151 (MacMillan & Co. 1913) (providing analysis of this Lockean tradition of interest-group pluralism by surveying the interests of the members of the constitutional convention). In this regard, it is interesting to note that the classic statement of the Lockean tradition, in which so many from the economic Right take pride, emerged from a Marxist orientation toward writing the history of the Founding. See Pangle, *supra* n. 28, at 131-279 (reading Locke to absorb and inspire much of the republican tradition); Waldron *supra* n. 11, at 124-26 (helping Pangle’s case by appropriating Locke for republicanism).

177. Waldron, *supra* n. 11, at 125.

This argument disarms majority rule. Waldron goes further to defend general representative government, invoking no less an authority (and elitist) than John Stuart Mill:

Everyone has a right to feel insulted by being made a nobody, and stamped as of no account at all. No one but a fool . . . feels offended by the acknowledgment that there are others whose opinion, and even whose wish, is entitled to a greater amount of consideration than his.¹⁷⁸

Aristotle helps Waldron along because Waldron detects a "Doctrine of the Wisdom of Multitude" (not the majority) in the *Politics*.¹⁷⁹ He defines the strong version as follows: "The people acting as a body are capable of making better decisions, by pooling the knowledge, experience, and insight, than any subset of the people acting as a body and pooling their knowledge, experience, and insight of the members of the subset."¹⁸⁰ Whether this doctrine is a loyal reading of Aristotle is not really the issue; the doctrine helps us see why legislative bodies, representative of the people at large in some nonfictive sense, can arrive at decent decisions. Culling again from Aristotle, Waldron propounds the idea that the wisdom of the multitude is only in effect when the body meets together in an assembly and the members greet each other face-to-face.¹⁸¹ Of course, this paradigm works mostly because Aristotle presupposes a catalogue of intellectual virtues in the representatives who come together to legislate, a question-begging assumption to be sure.¹⁸²

To fill the gap created by the unrealistic assumption that legislators have any incentive to nurture their intellectual virtues when they may instead barrel the pork, roll the logs, and seek the rents, there are the bits of Locke to which Waldron appeals to "make a case for John Locke as a theorist or proto-theorist of deliberative democracy."¹⁸³ Waldron draws our attention to the *Second Treatise's*

178. John Stuart Mill, *Considerations on Representative Government*, 335 (Prometheus Books 1991) (quoted in Waldron, *supra* n. 11, at 161).

179. *Id.* at 94.

180. *Id.*

181. *Id.* at 115.

182. Aristotle, *The Politics, Book II* in *The Complete Works of Aristotle* vol. 2, 2000, 2033-34, 1281b1-b20 (Jonathan Barnes ed., Oxford trans., Princeton U. Press 1984); Waldron, *supra* n. 11, at 115.

183. Waldron, *supra* n. 11, at 82.

argument that “the legislature is supreme, that it must never be subject to any other body, and thus to judicial review.”¹⁸⁴ Its supremacy results precisely because Locke is sure that even though Natural Law should always be a guide, even intellectuals will disagree about what Nature requires. Waldron shows that Locke was aware that his ideas would be “counter-intuitive,”¹⁸⁵ indicating a healthy space of disagreement that legislatures can live within. By showing Locke to be aware of fundamental contestation to be mediated by legislation, Waldron can recruit him in his general effort to stress law’s relationship to disagreement.¹⁸⁶

The last move needed to link Locke with a republican theory of dissensus is to suggest with Waldron that “Locke [thinks] that legislators are more likely to come up with a correct answer by reasoning aloud in each other’s presence and then voting.”¹⁸⁷ Waldron states:

Locke stresses how important it is for representatives to “freely act and advise, as the necessity of the Commonwealth, and the public good should upon examination, and mature debate be judged to require. This, those who give their Votes before they hear the Debate, and have weighed the Reasons on all sides, are not capable of doing.”¹⁸⁸

Whether this is a representative selection from the same Locke who expends great energy on his theory of Natural Law, and its objective nature, is less important for our purposes than seeing in a new light a way to conceive of legislatures as sites of deliberative contestation. Locke understood that there would be radical disagreement about what Natural Law requires. “What the legislators are supposed to do is attempt as honestly as they can (by reasoning together) to work out whether various proposals before them are in line with what Natural Law requires.”¹⁸⁹ Since for Locke a central

184. *Id.* at 63-64; see John Locke, *Two Treatises of Government* vol. II, 353 (Peter Laslett ed., Cambridge U. Press 1988).

185. Waldron, *supra* n. 11, at 74-75 (citing Locke, *supra* n. 183, at 272-73, 292-93, 296, 317-18, 342-43, 388).

186. See e.g. Jeremy Waldron, *Law and Disagreement* 23-24 (Oxford U. Press 2001).

187. Waldron, *supra* n. 11, at 81.

188. *Id.* at 82 (citing Locke, *supra* n. 184, at 222).

189. Waldron, *supra* n. 11, at 86.

characteristic of legislatures is their capacity to get things plain wrong, the process of legislation has an open-ended quality, amenable to a variety of fallible enactments, as long as those enactments do not conspire to close off "civil conversation."

As usual, the cynic will not care about the possible. She will tell us to glance at our politicians and our legislatures before we look to rely on a capacities argument. We are sure to find, as a general matter, that to which she is drawing our attention.¹⁹⁰ Nevertheless, there are moments when legislatures act as Locke imagined, as Waldron hopes for, and the project here is to get republicans to internalize this vision.

If the arguments to come are sound, republicans will be able to effect their legislation using the Guarantee Clause as a jurisdictional basis, a clause the courts have generally refused to interpret themselves without the help of the political branches. By focusing their arguments on legislative possibilities, republicans might see access to what they once perceived as untouchable because it was pluralist through and through. In this re-conception, republicanism could find a new power for the theory, the power of the Guarantee Clause. The next Part will provide a whirlwind tour of the sort of legislation republicans might try to encourage legislatures to pass if they were found actually to have the power to guarantee, with all legislation necessary and proper, a republican form of government. To be sure, I choose some counterintuitive legislative moves to sanction by way of the Guarantee Clause. Some more obvious attempts could be made too, but I figure if I stretch it, it will snap back to cover the easy cases.

IV. A LEGISLATIVE AGENDA FOR NEO-REPUBLICANISM

In the last seven years, we have witnessed the Court castrate congressional powers under various theories of overreaching. In a line of cases that probably can be said to start with *U.S. v. Lopez*,¹⁹¹ and *City of Boerne v. Flores*,¹⁹² the Court has substantially undermined what Congress may do under its Commerce Power of Article I, Section Eight and its Section Five Enforcement Power in the Fourteenth Amendment, respectively.¹⁹³ Although this is hardly the place to

190. *Contra* Bessette, *supra* n. 12, at 1-5.

191. 514 U.S. 549 (1995).

192. 521 U.S. 507 (1997).

193. *Lopez*, 514 U.S. at 551; *Boerne*, 521 U.S. at 511.

provide a review of—or even a bibliography for—the interpretation of these cases, it suffices to note that, pragmatically speaking, Congress may need to look elsewhere if it wishes to continue to pass what it perceives to be important legislation. My contention here is that theories of republicanism may help. If Congress can make legislative findings about what republican government requires, it may have access to an as yet undeveloped power, which may effectively support the passage of the kinds of legislation that the Court has been striking in a recent line of cases. Since the Guarantee Clause only vests Congress with the ability to guarantee a republican *form* of government, I will need to take up the difficult question of what shall count as “form,” and what as “substance” (although it is hardly clear that the Clause means to draw this modern distinction). Nevertheless, here I gloss over this issue very briefly, so that I may give the reader more context for the potential ambit of the Clause before parsing its syntax. In any case, even if the particular legislative acts endorsed under the Clause here seem too facile and make the Clause too elastic, such a conclusion hardly undermines the main purpose of this exercise: To show that the Guarantee Clause can be used as a jurisdictional basis for Congress to pass laws necessary and proper to guarantee a republican form of government, even if they have to spend some time arguing about what counts as republican and what counts as good form.

A. THE RESTORATION OF RELIGIOUS FREEDOM UNDER
NEO-REPUBLICANISM

When the Court decided *Employment Division v. Smith*,¹⁹⁴ severely curtailing Free Exercise rights as enunciated in cases such as *Wisconsin v. Yoder*,¹⁹⁵ and *Sherbert v. Verner*,¹⁹⁶ Congress did not take the decision sitting down. They reacted with a bipartisan measure, passing the *Religious Freedom Restoration Act of 1993 (RFRA)*.¹⁹⁷ *RFRA* was passed under the pretense of the legislative authority conferred by the Section Five Enforcement Power of the Fourteenth Amendment, giving Congress a penumbra of power to enforce the Free

194. 494 U.S. 872 (1990).

195. 406 U.S. 205 (1972).

196. 374 U.S. 398 (1963).

197. 42 U.S.C. §§ 2000bb (2000); John T. Noonan, Jr. & Edward McGlynn Gaffney, *Religious Freedom: History, Cases, and Other Materials on the Interaction of Religion and Government* 496 (2d ed., Found. Press 2001).

Exercise Clause through the Due Process Clause of the Fourteenth Amendment.¹⁹⁸ It aimed itself directly to undermine the Court's pronouncements in *Smith*: *RFRA* was explicitly Congress's attempt to impose its assessment of the constitutionality of *Smith* upon the Court, trying to force it to go back to the *Yoder* and *Sherbert* protections of religious freedom.¹⁹⁹

In *Boerne*, the Court told Congress just what it thought about their attempt to control the Court's balancing tests.²⁰⁰ The Court would not allow congressional overreaching by using its Enforcement Powers in ways that are not decidedly remedial: "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."²⁰¹ The Court tried to reaffirm Congress's broad power under Section Five, while simultaneously trying to delimit use of that power in "substantive" legislative acts.²⁰² In so doing the Court created the "congruence and proportionality test" that has been the thorn in the side of many attempts at progressive legislation. Finding *RFRA* to fail this newfound test, the Court struck down Congress's bipartisan effort to give a "democratic" interpretation to what the free exercise of religion means to the polity.²⁰³

Without too much analysis, we can question the Court's activism against a "democratically" determined interpretation of a constitutional provision. Nonetheless, for the neo-republicans fixated on judicial review, they may have a hard time dismissing the Court's insistence upon protecting constitutional interpretation from what they might see as a tyranny of the majority. After all, one theory of judicial review—one often invoked by neo-republicans—is precisely that majorities cannot always be trusted to protect individual rights enshrined in the

198. Daniel A. Farber, William N. Eskridge, Jr. & Philip P. Frickey, *Constitutional Law: Themes for the Constitution's Third Century* 218 (2d ed., West 1998).

199. Noonan & Gaffney, *supra* n. 197, at 496.

200. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

201. *Id.* at 520.

202. Robert C. Post & Reva Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 Yale L. J. 441, 457 (2001). They argue that "neither *Boerne* nor *Kimel* ever clearly explains the distinction between remedial and substantive legislation." *Id.* (citing Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 Wm. & Mary L. Rev. 743, 767-70 (1998)).

203. *Boerne*, 521 U.S. at 511.

Constitution, and it is the Court's province to be the institutional guarantor of those individual rights.²⁰⁴ But what if republicans embraced a different vision of republicanism? What if constitutional discourse was open to congressional readings?²⁰⁵ More specifically, what if the Guarantee Clause gives Congress the power to legislate in pursuance of its understanding about what a republican form of government entails? Religion is an easy case for republicans. As Part II suggested, religion and its protection is clearly tied to republican theory, both historically and in its modern incarnation. Any legislative findings and contests about the relationship of religion to republican forms of government could start with Pangle's documentary proof of the historical fact of their inextricability,²⁰⁶ and then move to Sunstein's idea that religion probably needs to be protected obsessively in any republic for the "cultivation of republican virtues."²⁰⁷ Without such substance, no formal requirements for republican government can be met; religion's protection is a *formal* prerequisite for any republican government. In any event, these sorts of tailored findings would likely support some kind of *RFRA*-like legislation were Congress to have the power to guarantee to each of the states, by appropriate legislation, with all means necessary and proper, a republican form of government.²⁰⁸

B. *THE RESTORATION OF THE VIOLENCE AGAINST WOMEN ACT
UNDER NEO-REPUBLICANISM*

The *Violence Against Women Act (VAWA)* afforded a civil remedy for people adjudged to be victims of gender-motivated

204. See e.g. Pettit, *supra* n. 10, at 180-83.

205. See e.g. *City of Rome v. U.S.*, 446 U.S. 156, 207 (1980) (acknowledging that the Reconstruction Amendments might allow Congress's various Enforcement Powers to pronounce constitution violations that a Court would not find under the same amendment); *Or. v. Mitchell*, 400 U.S. 112 (1970); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *S.C. v. Katzenbach*, 383 U.S. 301 (1966). For my purposes, however, I am highlighting areas where the Court has been particularly resistant to extend to Congress a voice in constitutional interpretation.

206. See Brown, *supra* n. 100, at 99; Pangle, *supra* n. 28, at 198-229.

207. Sunstein, *supra* n. 2, at 1578.

208. This time around, however, I think Congress should not be so fixated on telling the Court how to conduct its own balancing tests. By playing nice, Congress is more likely to be heeded by what is, in effect, another political branch.

violence.²⁰⁹ Two congressional powers were recruited to justify its enactment—the Commerce Power and the Section Five Enforcement Power.²¹⁰ In *United States v. Morrison*,²¹¹ the Court determined that neither of these powers vested Congress with the appropriate authority to pass *VAWA*.²¹² By applying *Boerne*’s “congruence and proportionality test,” the Court disposed of the Enforcement Power’s scope, and by applying the principles of *Lopez*, the Court rejected that the legislative findings sanction such a broad measure as was exercised in *VAWA* under the Commerce Clause.²¹³ Whittling away at two of Congress’s enumerated broad grants of power under the Constitution, the Court left Congress impotent to rectify its own determination that gender-motivated violence requires some congressional federal policing.

As with many of the Court’s recent decisions, concerns about federalism and states’ rights intrude upon the Court’s readiness to give the Congress broad powers to organize state activities. I do not intend here to evaluate how federalism should be balanced with Congress’s constitutional exercises of powers, or how federalism might be used as a technique of statutory interpretation. However, we don’t need to embrace the theory of the orphaned *Garcia v. San Antonio Metropolitan Transit Authority*,²¹⁴ that federalism should simply be left to the political process, to make the claim that Congress’s enumerated powers should be given more deference than the current Court seems willing to provide.²¹⁵ Nevertheless, as a matter of practicality the holding of *Morrison* is likely to continue to restrict Congress’s ability to pass the sort of protections *VAWA* was meant to provide if Congress can only recruit the two powers at issue therein.

Leaving to one side the Court’s reliance on ancient and indeterminate precedents for the proposition that the Fourteenth Amendment, “[has] reference to State action exclusively,”²¹⁶ the Court

209. 42 U.S.C. § 13981 (2000).

210. *U.S. v. Morrison*, 529 U.S. 598, 604 (2000).

211. *Id.* at 598.

212. *Id.* at 627.

213. *Id.* at 607-11.

214. 469 U.S. 528 (1985).

215. *Id.* at 546-47, 552-54.

216. *Morrison*, 529 U.S. at 671 (citing *The Civil Rights Cases*, 109 U.S. 3 (1883); *U.S. v. Harris*, 106 U.S. 629, 639 (1883)).

nonetheless seems committed to a robust state action requirement. This is not the place to contest the need for that requirement, or make recommendations for the Court to look to the Citizenship Clause of the first sentence of the Fourteenth Amendment, or to look to the Enforcement Clauses of the other Reconstruction Amendments—as (the first Justice) Harlan did in his dissent to *The Civil Rights Cases*.²¹⁷ Instead, the legislative focus to the theory of republicanism propounded in Part II recommends for the legislature to make an attempt to pass *VAWA*-like legislation under their enumerated power to guarantee a republican form of government to the states. *Brewer v. Hoxie School District* seems to suggest quite overtly that the Guarantee Clause is not limited by a state action requirement.²¹⁸

Perhaps the more intuitive clause to look to might be found in different provision of Article IV, Section Four (where the Guarantee Clause is located)—the Domestic Violence Clause. We might imagine some reading of that clause in another possible world—for example the DVC-in-alpha—that would sanction congressional power to get involved in the problem of gender-motivated violence and pass any legislation necessary and proper to address the problem.²¹⁹ Nevertheless, the focus here is on the Guarantee Clause, emphasizing how Congress might pass progressive legislation under their power to say what a republican form of government requires.

Unfortunately, policing gender-motivated violence does not—at first blush—appear to raise any issue of republicanism and seems even further removed from republican *forms*. In fact, theories of classical republicanism and the theories of republicanism prevalent at the founding are notorious for their phobic orientation against the feminine.²²⁰ As I noted above, patriarchy was linked closely with republicanism,²²¹ and one need look no further than *Minor v.*

217. 109 U.S. at 33 (Harlan, J., dissenting).

218. 238 F.2d 91, 98-99 (8th Cir. 1956).

219. Tali Farhadian (Yale Law School, Class of 2003), in a discussion with me about Article IV, made this recommendation. Unfortunately, the idea seems foreclosed by any faithful reading of constitutional history. See generally Bybee, *supra* n. 5; Student Author, *Federal Intervention in the States for the Suppression of Domestic Violence: Constitutionality, Statutory Powers, and Policy*, 1966 Duke L.J. 415, 458-62 (for a longer discussion of the possibilities and the foreclosures of the Domestic Violence Clause).

220. Kerber, *supra* n. 31, at 1666.

221. *Id.* at 1667.

Happerset,²²² to see the Supreme Court concurring with the view that denying women the suffrage was completely consistent with a republican form of government.²²³ During the Founding, the *Minor* Court argues, states that denied women rights were admitted as republican. Therefore, women would never be heard to complain that voter qualifications in their states deny them a republican form of government.

Minor is a hard precedent to overcome, except for the fact that the Court became less and less willing to commit itself to the original intent or meaning of a republican form of government at the Founding (which is not the case with the Domestic Violence Clause, by the way).²²⁴ The Court, as we shall see, became more and more willing to deny justiciability and let the other political branches duke it out, contesting over what republicanism means in the contemporary context. Thankfully, originalism will not be an impediment to my Guarantee Clause analysis.

And it seems clear that modern theories of republicanism are not intrinsically as resistant to the rights of women as they once were. Kerber has led the way, as in so much else, toward a more feminist emphasis to republicanism. She points out that “[i]n republics, Montesquieu suggested, women might have at least a modest degree of ability to forge their own political identities.”²²⁵ She also draws our attention to Lester Cohen’s exposition of Mercy Otis Warren’s analysis of “the role of the mother with republican principles,”²²⁶ highlighting how republicanism can touch the concerns of women, even if Warren’s particular concern was hardly what progressives would imagine today to be appropriately feminist.²²⁷

Hanna Pitkin also traced republicanism’s roots in male-chauvinism, but Kerber hints to a note of hope by linking the extension of who republicanism can be read to protect to the extension of who is accepted in the military: Owing to republicanism’s military fixation, it

222. 88 U.S. 162 (1874).

223. *Id.* at 175-76.

224. Farber, Eskridge & Frickey, *supra* n. 198, at 1050-51.

225. Kerber, *supra* n. 37, at 483; Montesquieu, *supra* n. 70, at 111.

226. *Id.* (citing Lester Cohen, *Explaining the Revolution: Ideology and Ethics in Mercy Otis Warren’s Historical Theory*, 37 Wm. & Mary Q. 200 (1980); Lester Cohen, *Mercy Otis Warren: The Politics of Language and the Aesthetics of Self*, 35 Am. Q. 481 (1983)).

227. Compare *id.* with MacKinnon, *Feminism*, *supra* n. 89, at 5-17.

became connected with the protection of those who bear arms.²²⁸ Since women now serve in the army, they may now be included in the category of people who can acquire *virtù* or republican virtue, and are no longer relegated to the feminine appellation of *fortuna*, changeable and unpredictable.²²⁹ Because republicanism can now more easily accommodate a feminist perspective for a variety of reasons, it might be fruitful for Congress to employ its power to guarantee a republican form of government in service of feminist aims.

Of course, there is countervailing evidence suggesting feminism's *incompatibility* with republicanism, some of which Kerber herself provides.²³⁰ Therefore, another avenue for organizing a policy program under a power to guarantee a republican form of government might be found in the theory of non-domination explored in connection with Pettit's theory in Part II. Utilizing his ideas about what republicanism requires, augmented perhaps by some ideas from MacKinnon about just what non-domination demands, Congress might produce a very similar statutory provision to *VAWA*. By taking note that domination can occur by any facilitation of arbitrary interference with the choices of free persons, Congress may establish a civil remedy to deter such interference. It may, of course, find that such a provision is unnecessary. But the idea is to facilitate its capacity to start the "civil conversation," a conversation that has been foreclosed by *Boerne*'s roadblock. Form is no bar either—guaranteeing a form of government means working on culture to ensure that full participation is available to all. Finally, as I hope to show, there is no state action requirement constraining the Guarantee Clause.²³¹

If my sketch of republicanism's virtues in Part II emphasized anything, it should have been its flexibility and its discontent with one theory of the truth of the matter when it comes to republicanism's self-definition. If Congress is willing to enter a contestatory dialogue about how *VAWA* might be justified under a theory of republicanism (and republican formal prerequisites to full participation), it might be led to

228. For more on the connection between republicanism and militarism, see *supra* notes 119-121, and accompanying text.

229. Kerber, *supra* n. 31, at 1667 (citing Pitkin, *supra* n. 171, at 152; Pocock, *supra* n. 28, at 37).

230. Linda K. Kerber, *The Republican Mother: Women and the Enlightenment—An American Perspective*, 28 Am. Q. 187, 199-205 (1976); Linda K. Kerber, *Women of the Republic: Intellect and Ideology in Revolutionary America* 7-12 (U.N.C. Press 1980).

231. *Contra* Bonfield, *Desuetude*, *supra* n. 5, at 566-67.

re-pass *VAWA* under completely different pretenses, but still under a power specifically enumerated to it by the Constitution. When it debates about what counts as republican forms, whether gender is a source of domination should certainly be relevant; providing a civil remedy be a proper means to reshape states' forms of government more consistently with modern republican principles to maximize political participation.

C. *THE RESTORATION OF FEDERAL ANTIDISCRIMINATION LAWS
(AND ABROGATION OF ELEVENTH AMENDMENT SOVEREIGN
IMMUNITY?) UNDER NEO-REPUBLICANISM*

By now, you are undoubtedly catching my drift, so let me save some trees and make the shorter version of the argument to restore abrogation of states' Eleventh Amendment sovereign immunity under the *Age Discrimination in Employment Act of 1967 (ADEA)*,²³² and the *Americans with Disabilities Act (ADA)*.²³³ While the substance of these provisions does not at first blush seem to be about forms of government, surely the states' relation to the federal government—and its sovereign immunity—could qualify as a formal matter.

In *Kimel v. Florida Board of Regents*,²³⁴ the Court reaffirmed its commitment made in *Seminole Tribe of Florida v. Florida*,²³⁵ and subsequent cases,²³⁶ that “[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.”²³⁷ Nonetheless, the Court in *Kimel* acknowledges that the Enforcement Power associated with Section Five of the Fourteenth Amendment “does grant Congress the authority to abrogate the States’ sovereign immunity.”²³⁸ The Court confirmed that “the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of [Section Five] of the Fourteenth

232. 29 U.S.C. § 621 et seq. (2000).

233. 42 U.S.C. §§ 12111-12117 (2000).

234. 528 U.S. 62 (2000).

235. 517 U.S. 44 (1996).

236. *E.g. Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999); *Alden v. Me.*, 527 U.S. 706 (1999).

237. *Seminole Tribe*, 517 U.S. at 72.

238. *Kimel*, 528 U.S. at 80.

Amendment.”²³⁹ Notwithstanding this concession, the Court applied the *Boerne* test to strike the provision of the *ADEA* that abrogates states’ Eleventh Amendment immunity.²⁴⁰ In the *ADA* corollary to *Kimel*, *Board of Trustees of the University of Alabama v. Garrett*,²⁴¹ the Court determined just the same, that Congress’s Section Five Enforcement Clause Power could not abrogate states’ Eleventh Amendment immunity.²⁴²

Again, this is not the place to review the soundness of the Court’s application of the *Boerne* test.²⁴³ It suffices to note that notwithstanding the Court’s willingness to talk big about the “affirmative” powers vested by the Enforcement Clause,²⁴⁴ the Court believes that the “ultimate interpretation and determination of the Fourteenth Amendment’s substantive meaning remains the province of the Judicial Branch.”²⁴⁵ Thus, were Congress committed to the abrogation of the Eleventh Amendment immunity in the context of the *ADEA* and the *ADA*, it may need to look to other provisions of the Constitution that are not generally considered to be the “province” of the judiciary. Moreover, *Seminole Tribe* determined that the Commerce Clause powers are powerless to effect the abrogation.²⁴⁶ This article recommends capitalizing upon the Guarantee Clause,

239. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

240. *Kimel*, 528 U.S. at 82-83.

241. 531 U.S. 356 (2001).

242. *Id.* at 372-74.

243. For a critical treatment of the Court’s *Boerne* jurisprudence, see Post & Seigel, *supra* n. 202, at 452-56.

244. *Kimel*, 528 U.S. at 80-81; *see Garrett*, 531 U.S. at 386-87 (Breyer, J., dissenting). Justice Breyer stated in his dissent:

The Court’s more recent cases have professed to follow the longstanding principle of deference to Congress . . . “Congress’ § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment.” Rather, Congress can prohibit a “somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment’s text”; Congress must have wide latitude . . . (Congress’ “conclusions are entitled to much deference”). And even today, the Court purports to apply, not to depart from, these standards. . . . But the Court’s analysis and ultimate conclusion deprive its declarations of practical significance. The Court “sounds the word of promise to the ear but breaks it to the hope.”

Id. at 386-87 (Breyer, J., dissenting) (citations omitted).

245. *Kimel*, 528 U.S. at 81.

246. *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 47 (1996).

giving Congress some oversight in determining how states conform to the standards of a republican form of government. It will certainly help matters that, as we shall see, the Court generally believes it to be the province of the political branches to determine just what the guarantee means.

But one large stumbling block to getting antidiscrimination law passed under the ambit of republicanism is that republicanism doesn't seem to speak directly to the situations of the disabled or the aged. More, republicanism might demand specifically that states retain sovereign immunity as a general rule—the guarantee of a republican form of government in the Constitution might mean that Congress must generally have a hands-off approach to states, giving them some freedom from federal control. Under this reading of republicanism, divided sovereignty takes a prominent place in the catalogue of republican virtues. Thus, the theory of federalism now espoused by the Court—surely the dominant theory that helps explain the line of cases treated here and that buttresses support for the emasculation of congressional authority—might need to become part of a theory of republicanism focused upon the legislature.²⁴⁷ Republicanism might require state autonomy, leaving Congress unable, under republican theory (specifically the Guarantee Clause, which may in any case be limited by the Eleventh Amendment), to abrogate sovereign immunity.²⁴⁸

247. Merritt, *supra* n. 5, at 70-78 (discussing the contours of the version of republicanism currently espoused by the Court); Deborah Jones Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. Colo. L. Rev. 815, 827-32 (1994) (discussing the future of the Guarantee Clause in light of the Clause's embodiment of a "judicially enforceable limit on national interference with state autonomy"). As with most legal scholars, Merritt focuses on judicial review, but the theory could be extended to speak to legislatures.

248. Since the Eleventh Amendment was ratified after Article IV, the amendment may render Guarantee Clause power as weak as the Article I powers are—after *Seminole Tribe*—with respect to the abrogation of state sovereign immunity. Ultimately, I have no doubt that five judges would affirm this rationale to prevent the abrogation. But Congress could still try to make the argument in good faith, since *Seminole Tribe* was clearly limited to Article I. 517 U.S. at 44. Even those Article I arguments were more sophisticated than the "last in time" argument. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000). That argument might be much stronger, of course, if the Eleventh Amendment actually was written with the intent the Court has found in it. We all know that reading to be a canard.

One more effort to save Article IV from death by Eleventh Amendment doctrine would be to read the Reconstruction Amendments as both Professors Amar and

Of course, republicanism might not require this at all. The point of republicanism's flexibility is that such a value is ultimately a question to be settled by deliberative assemblies in the legislature. If Congress takes its responsibility seriously to guarantee a republican form of government to the states, it may have a substantial degree of discretion to be primarily concerned with the *people* of the states, not the states themselves. In *Texas v. White*,²⁴⁹ the Court decided that the Guarantee Clause was drawn to protect the *people*, not the political unit of the state or the geographic area of the state.²⁵⁰ This focus upon the Clause was reaffirmed in *White v. Hart*.²⁵¹ In both of these instances, the power of the Guarantee Clause given to Congress includes all means "necessary and proper."²⁵² Hence, it would ultimately be Congress's "province" to decide just what level of federal antidiscrimination law is warranted to ensure a republican form of government. Moreover, if constitutional interpretation of the Guarantee Clause were wholly within the province of the political branches, Congress could reasonably decide that Eleventh Amendment immunity does not protect states against the newly justified *ADEA* and *ADA* suits. Surely, discrimination fails to satisfy Part II's theory of republicanism as prizing non-domination. Encouraging Congress to keep arguing about what means are necessary to bring about non-domination, however, does conform to Part II's theory regarding the vision of contestatory disagreement as a primary republican virtue.

Part of the healthy disagreement in any republican government will include judges who occasionally get their opportunity to contest congressional enactments—and nothing said here should be read to deny the right of judicial review. Instead, this project is aimed to show how theories of republicanism can return to legislators a right they once had before the *Boerne* test tied their hands behind their back—to say what they think the Constitution means.

Ackerman do, as a constitutional revolution or moment that recasts the entirety of the document that came before. Under this reading, the federal-state balance has been recalibrated and Article IV may be saved from the tentacle of the Eleventh Amendment.

249. 74 U.S. 700 (1868).

250. *Id.* at 721; Wiecek, *supra* n. 6, at 235-36.

251. 80 U.S. 646, 650 (1871).

252. *E.g. Texas*, 74 U.S. at 729; *White*, 80 U.S. at 650-51; Wiecek, *supra* n. 6, at 235-36.

To be sure, I could go on and address what this article's discussion of intellectual virtues might sanction by way of federal educational policy, but the flavor of the argument should by now be clear. What isn't clear is how this approach squares with what has been said about the Guarantee Clause by judges and scholars. Parts V and VI aim at this clarification.

V. STRUGGLING TOWARDS JUSTICIABILITY

In lawyers' discussions of the Guarantee Clause, we can trace a further embodiment of the obsession with judicial review to the detriment of republicanism. Martin Redish notes:

Because the problems to be corrected [in neo-republicanism] are in the legislature itself, it is not surprising that, for the most part, neo-republican scholars urge a substantial increased role for the judiciary, which was purposely insulated from the majoritarian political pressures.²⁵³

But the contention here is that it is also not surprising that arguments about what the Guarantee Clause means unnecessarily focus on judicial review as well. This Part makes an effort—without making any pretensions to an exhaustive analysis—to highlight the Supreme Court's treatment of the Clause and scholars' reactions, both of which concentrate on justiciability, on the question of whether the Court has institutional competence to make determinations of what the guarantee is supposed to mean in the functioning of the republic. This Part lays the foundation for the thesis that the focus on judicial review obscures the potential uses for the Clause revealed in Part IV, and argued for in Part VI.

A. SOME CASES

The posture of most of the challenges brought before the Court provides a great deal of help in understanding why the cases come out as they do. When *citizens*—corporate or otherwise—make attempts to bring challenges under the Clause, claiming that their right to a republican form of government has been abridged, it is hardly surprising to watch courts refusing to entertain such discussions and leaving such guarantees to the political processes. Surely, much of

253. Redish, *Federal Courts*, *supra* n. 23, at 12-13.

what republicanism means is that the populace is supposed to make its preferences known through electing a representative legislature,²⁵⁴ and it is the legislatures' responsibility to be responsive to popular concerns. If they fail, it is largely the responsibility of citizens to "take up arms against [their] sea of troubles" and by voting against the representatives, "end them."²⁵⁵ To be sure, there will be breakdowns in this idealized version of electoral politics, and it would only then be appropriate for the Court to step in. And the jurisprudence—or lack thereof—of the Guarantee Clause tends to err in favor of the electoral process.

Most investigations of the history of the Guarantee Clause in the Court start with *Luther v. Borden*.²⁵⁶ *Luther* declared in 1849 that virtually all claims based on the Guarantee Clause are nonjusticiable, and the Court has not substantially departed from that pronouncement to this day.²⁵⁷ In the context of settling a case and controversy that could be disposed of only by taking a side in the Rhode Island Dorr Rebellion of 1842, the Court opted to take itself out of the mediation by developing a theory of nonjusticiability. The Court would refuse to decide cases that forced them to navigate between competing theories of what republicanism means. In *Luther*, the Court was asked to determine which government in Rhode Island was legitimate in 1842—one based upon a 1663 charter from King Charles II, which severely malapportioned representatives, or a new constitution adopted outside the charter process by a popular majority.²⁵⁸ The Court declined to adjudicate, leaving in power the Freeholder charter government, undermining the popular Constitutionalist movement.²⁵⁹

Though the Taney Court embraced Webster's argument that the case *Luther* presented was "outside 'judicial cognizance,'" ²⁶⁰ the Court left the ultimate decision to the Rhode Island Supreme Court, leaving the question merely nonjusticiable at the federal level.²⁶¹ The

254. For the implicit logic of the "structural preferences" strain of republicanism, see *supra* notes 77-81, and accompanying text.

255. William Shakespeare, *Hamlet* Act III, Scene 1, 127 (Barbara A. Mowat & Paul Werstine eds., Wash. Square Press 1992).

256. 48 U.S. 1 (1849).

257. *Id.* at 46-47.

258. *Id.* at 1.

259. *Id.* at 47.

260. Wiecek, *supra* n. 6, at 117.

261. *Id.* at 120.

decision basically put forth a “political question” rationale, and this has served as its most durable doctrine, albeit one that is quite irritating to commentators. Even Woodbury’s dissent agreed with the “danger” associated with the Court’s meddling in political matters, such as were at issue in *Luther*.²⁶² Taney simply felt that “courts are not proper bodies to choose among competing political theories and impose them on the states” when the competing theories come directly from the citizenry.²⁶³ He was insistent that it made no sense for the Court to adjudicate cases upon which other branches have already spoken.²⁶⁴ In the case of *Luther*, the Dorr Rebellion had taken its course and there were already pronouncements from the political branches, effectively mooting the case before the Court.²⁶⁵

Just what the holding of *Luther* really is—and what is merely dicta—is too complicated a matter for the present inquiry. However, the case did take a stand on the important question of just who the Guarantee Clause was targeted to protect: “[A]ccording to the institutions of this country, the sovereignty in every State resides in the people of the State,” and not in the State government itself.²⁶⁶ Some commentators try to limit the holding of *Luther*: “[A] narrower reading of *Luther*’s holding makes much more sense. The key issue in the case was not whether the charter regime was Republican, but whether it was a *Government*.”²⁶⁷ Nonetheless, the subsequent cases do not bear out this thesis and, much more generally, remove anything that smacks of a challenge based on a contentious theory of republicanism from the Court’s cognizance.

In 1874, *Minor v. Happersett* pushed the Court two steps backward, as it recoiled from the radically hands-off nature of *Luther*.²⁶⁸ There, the Court claimed to “have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution.”²⁶⁹ *Minor* refused women the right to vote under a theory of republicanism, suggesting outer limits to the

262. *Luther v. Borden*, 48 U.S. 1, 51 (1849) (Woodbury, J., dissenting).

263. Wiecek, *supra* n. 6, at 125.

264. *Luther*, 48 U.S. at 47.

265. Wiecek, *supra* n. 6, at 126.

266. Amar, *supra* n. 40, at 777 (citing *Luther*, 48 U.S. at 47).

267. *Id.* at 776 (emphasis added).

268. 88 U.S. 162 (1874).

269. *Id.* at 176.

force of the political question doctrine's exclusion of the judiciary from positing a theory—in this case an originalist theory—of what the Guarantee Clause means for individual rights.²⁷⁰ Nonetheless, the fact that a citizen brought the action made it easy for the Court to direct women to the political process to ensure their rights.

The next group of cases in the non-jurisprudence of the Guarantee Clause emerged during the Progressive Era, as direct democracy took hold. Since the Guarantee Clause seemed to be adjudicated on an implicit theory of the separation of powers, questions of delegation arose as state governments began to employ popular mechanisms to circumvent the demands of representative government. By allowing citizens to use the referendum and initiative processes to pass legislation, Progressives seemed to undermine Madison's explicit definition of republicanism as representative government.²⁷¹ If *Minor*'s originalist theory was to have any bite, surely direct democracy would need to be adjudged violative of the republican form of government.²⁷²

But the Court refused to extend *Minor*, and instead relied on *Luther* to refuse justiciability in the central case that addressed Progressive forms of government embodied in the referendum and initiative.²⁷³ *Pacific States Telephone & Telegraph Co. v. Oregon*²⁷⁴

270. *Id.* at 177-78.

271. *Rice v. Foster*, 1847 WL 648, *14 (Del. 1847) (finding that an act that authorized the people to decide by referendum whether to license the sale of liquor, "tends to subvert our representative republican form of government").

272. Critics of direct democracy often make this argument. *E.g.* Hans Linde, *On Reconstituting "Republican Government,"* 19 Okla. City U.L. Rev. 193 (1994). I deflect this concern with my propensity to see republicanism as open-ended and as constantly in the process of being revised. Much of the logic for representative government relied on the intellectual virtues and the propertied—hence incorruptible—nature of representatives. Surely, circumstances have changed enough to cause us to reassess just how central representative government is to republicanism. I mean to say that it continues to be central, just not in all contexts such that we need to do away with all versions of direct democracy. *See Leib, supra* n. 35, at 400-01 (for a version of what would be an appropriate mixed regime of representative and direct democracy).

273. There were many state challenges that were also refused. *See e.g. Ark. v. Nichols*, 26 Ark. 74 (1870); *Denver v. Sours*, 74 P. 167 (Colo. 1903); *Village of Saratoga Springs v. Saratoga Gas, Elec. Light & Power Co.*, 83 N.E. 693 (N.Y. 1908); *Eckerson v. City of Des Moines*, 115 N.W. 177 (Iowa 1908); *Louisville & Nashville R.R. Co. v. Greenbrier Distillery Co.*, 187 S.W. 296 (Ky. 1916); *Santee Mills v. Query*, 115 S.E. 202 (S.C. 1922); *La. v. Smith*, 166 So. 72 (La. 1935); *Minn. v. Quinlivan*, 268 N.W. 858 (Minn. 1936); *In re Interrog. of the Gov.*, 65 P.2d 7 (Colo. 1937). Some

drew heavily upon *Luther's* political question doctrine to allow the Court to recuse itself from deciding what constitutes a republican form of government, even though there was substantial historical evidence in the words of the Framers recommending against direct democracy.²⁷⁵ Of course, *Minor* is bad law for a number of reasons, but *Pacific States* further forecloses reliance on *Minor* for the proposition that the original intent of the Guarantee Clause is dispositive in judicial contexts.

In *Colegrove v. Green*,²⁷⁶ Frankfurter made the most overt proclamation with the regard to the Guarantee Clause yet, generally denying justiciability by stating, “[v]iolation of the great guaranty of a republican form of government in States cannot be challenged in the courts.”²⁷⁷ It is plain that the Court has held Guarantee Clause claims nonjusticiable as political questions in a variety of different kinds of cases.²⁷⁸ But this raises the question of whether Guarantee Clause claims are inherently nonjusticiable, or whether it is the political questions they often raise that makes them so.

Baker v. Carr answers this question, suggesting the latter, scaling back from Frankfurter’s monolithic view of the clause.²⁷⁹ The holding of *Baker* is that Guarantee Clause claims are nonjusticiable because they raise political questions upon which the Court is resistant to make pronouncements: “Guaranty Clause claims involve those elements which define a ‘political question,’ and for that reason and no other, they are nonjusticiable [T]he nonjusticiability of such claims has

state courts, however, “pointed to the wide variations in local government at the time the Constitution was adopted and concluded that the clause neither restricts the form of local government nor limits the degree of popular direct participation in city or county government.” Wiecek, *supra* n. 6, at 259 (citing *Eckerson v. City of Des Moines*, 115 N.W. 177 (Iowa 1908); *People v. Edmands*, 96 N.E. 914 (Ill. 1911); *Walker v. Spokane*, 113 P. 775 (Wash. 1911); *City of Jackson v. Miss.*, 59 S. 873 (Miss. 1912); *Hile v. City of Cleveland*, 141 N.E. 35 (Ohio 1923); *Sarlls v. Ind.*, 166 N.E. 270 (Ind. 1929)).

274. 223 U.S. 118 (1912).

275. *Id.* at 147.

276. 328 U.S. 549 (1946).

277. *Id.* at 556.

278. *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937) (challenging delegation to agencies); *Cochran v. La. St. Bd. of Educ.*, 281 U.S. 370, 374 (1930) (challenging taxation); *Mt. Timber Co. v. Wash.*, 243 U.S. 219, 234 (1917) (challenging worker’s compensation); *Ohio v. Hildebrandt*, 241 U.S. 565, 569 (1916) (challenging referendums).

279. 369 U.S. 186, 218 (1962).

nothing to do with their touching upon matters of state governmental organization.”²⁸⁰ In one fell swoop, the Court settles the question of why the judiciary doesn’t hear Guarantee Clause claims and further indicates that federalism concerns are not central to their analysis—a point to which we will need to return.

Here are the standards *Baker* set for determining when a question is too political for the Court to get its hands dirty:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.²⁸¹

We can surely quibble with just how useful this definition is.²⁸² It does seem absurdly overinclusive, since many challenges heard before the Court are precisely the ones where the Court must discover and manage their own standards, and must encroach upon the political branches’ textually granted powers because the branches overreach. Nonetheless, the Court delimited the *per se* version of nonjusticiability by providing standards to determine what counts as a political question. This leaves open the possibility that the Court would find some Guarantee Clause claims justiciable. *Reynolds v. Sims* noted that only “some questions raised under the Guarantee Clause are nonjusticiable.”²⁸³

But that open possibility has never been fruitfully utilized. Fast-forward thirty years to *New York v. United States*.²⁸⁴ There, Justice O’Connor countenanced a Guarantee Clause claim, only to dismiss it

280. *Id.* at 218.

281. *Id.* at 217.

282. E.g. Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 Cornell L. Rev. 393, 497-511 (1996).

283. 377 U.S. 533, 582 (1964).

284. 505 U.S. 144 (1992).

summarily.²⁸⁵ Although noting that the presumption in favor of nonjusticiability “has not always been accepted,” she only proceeds by assuming justiciability without actually conferring it.²⁸⁶ Indeed, this is the current state of the Guarantee Clause: Whenever it gets addressed, courts qualify their jurisdictional authority over the matter either by including in their discussion the disclaimer, “[e]ven assuming the justiciability [of the Clause],”²⁸⁷ or they take the “assuming, *arguendo*, that [the litigant] has presented a justiciable claim” posture.²⁸⁸ Then they universally refuse to find a violation.²⁸⁹

B. THE COMMENTARY—“WE WANT JUSTICIABILITY . . . AND WE WANT IT NOW.”

Given the active (if not repetitive) discussion of justiciability in the courts, it is no surprise to see lawyers focused on this very question. Commentators try to find a class of questions that could be held to be justiciable, or try to undermine the political question doctrine to expand this class much more broadly. The general hope for a jurisprudence of the Guarantee Clause is likely to continue to fail, if scholars can find no more creative way to approach the problem than by telling the courts over and over again, “No, you have it wrong. The Guarantee Clause *is* justiciable—and here’s what I think it means you need to start doing.”

One of the more modest attacks targeted to undo the Clause’s “desuetude” as it succumbs to nonjusticiability is to provide a theory of why and how the Guarantee Clause in particular should be held to be

285. *Id.* at 184.

286. *Id.* at 184-85 (claiming that “in a group of cases decided before the holding of *Luther* was elevated into a general rule of nonjusticiability, the Court addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were not justiciable”) (citing *Mich. v. Lowrey*, 199 U.S. 233, 239 (1905); *Forsyth v. Hammond*, 166 U.S. 506, 519 (1897); *Plessy v. Ferguson*, 163 U.S. 537, 563-64, (1896) (Harlan, J., dissenting) (finding racial segregation “inconsistent with the guarantee given by the Constitution to each State of a republican form of government”); *Duncan v. McCall*, 139 U.S. 449, 461-62 (1891); *Minor v. Happersett*, 88 U.S. 162, 175-76 (1874)).

287. See *City of N.Y. v. U.S.*, 179 F.3d 29, 37 (2d Cir. 1999); see e.g. *U.S. v. Vazquez*, 145 F.3d 74, 84 (2d Cir. 1998); *Padavan v. U.S.*, 82 F.3d 23, 29 (2d Cir. 1996); *Bowman v. City of Indianapolis*, 927 F. Supp. 309, 312 (S.D. Ind. 1996); *U.S. W. Commun., Inc. v. M.F.S. Intelenet, Inc.*, 35 F. Supp. 2d 1221, 1232 (D. Or. 1998); *Adams v. Clinton*, 90 F. Supp. 2d 35, 71 (D.D.C. 2000).

288. *Cal. v. U.S.*, 104 F.3d 1086, 1091 (9th Cir. 1997).

289. For examples of the refusals to find violations, see *supra* notes 284-86.

justiciable.²⁹⁰ This approach is by far the most common in the secondary literature.²⁹¹ By redescribing the holdings of the various central cases that serve as the most controlling precedents, scholars are able to downplay the Court's historical commitment to nonjusticiability. For example, Amar reads that the central question of *Luther* "was akin to the international question of 'recognition'—a question committed to the federal political branches under our Constitution."²⁹² In this act of rereading, he is able to mitigate its holding, directing the current Court to find the Clause justiciable, provided the case or controversy does not raise this particularly sticky question of recognition. Also, Amar suggests that "[a] Supreme Court that saw what happened to a President who challenged Congress's theory of the [Guarantee] Clause took pains to avert a showdown of its own with Congress—and even years later, would reflexively jerk away from any case implicating this dangerous clause."²⁹³ By telling his story of the triumph of nonjusticiability as historically contingent and not as having emerged from faithful adherence to *Luther*, he is able to cast some doubt on whether the Court should press forward with its general policy of nonjusticiability.

Another argument regularly launched highlights how "other big clauses," notably the Due Process Clause and the Equal Protection Clause, have the same expansive "potential breadth" as the Guarantee Clause.²⁹⁴ By emphasizing the obvious flexibility of the Due Process and Equal Protection Clauses, these scholars are able to show just how odd it is that the Court wants to claim that there is something particular

290. See generally Bonfield, *supra* n. 5, at 513.

291. Ely, *supra* n. 5, at 118 (arguing for justiciability broadly in reapportionment cases); Bork, *supra* n. 5, at 18-19; Seeley, *supra* n. 5, at 905-10 (arguing for justiciability in cases of bad outcomes of direct democracy, directly contradicting the holding of *Pacific States*); Smith, *supra* n. 5, at 565-80 (recommending justiciability when a state violates its own laws); Berg, *supra* n. 5, at 209 (arguing that "[t]he Guarantee Clause should be the basis for enforcing the nondelegation principle against the states"). Farber, Eskridge, & Frickey, *supra* n. 198, at 959-63 (suggesting that even in the best case scenario, only state courts will enforce state versions of the doctrine). Accordingly, some scholars argue that it is upon state courts to confer justiciability. E.g. Edward A. Stelzer, *Bearing the Judicial Mantle: State Court Enforcement of the Guarantee Clause*, 68 N.Y. U. L. Rev. 870, 887-94 (1993).

292. Amar, *supra* n. 40, at 776; but see Louise Weinberg, *Political Questions and the Guarantee Clause*, 65 U. Colo. L. Rev. 887, 928-31 (1994).

293. Amar, *supra* n. 40, at 780.

294. *Id.* at 753.

about the Guarantee Clause that resists the potential for manageable and discoverable judicial standards. Redish puts it nicely:

Over a period of many years, the Supreme Court has developed numerous specific principles of personal jurisdiction and concepts of fair procedure without the slightest hint of guidance from either the language or history of the Due Process Clause. Similarly, the Court has adopted shifting standards of scrutiny under the [E]qual [P]rotection [C]lause that find little or no basis in the vague terms of that provision The dubious nature of the “absence of standards” view is illustrated by Justice Brennan’s opinion in *Baker*,[.] . . . where he suggested that a constitutional challenge to state gerrymandering pursuant to Article IV’s Guarantee Clause would be dismissed for lack of susceptibility to workable judicial standards, though a similar challenge brought under the [E]qual [P]rotection [C]lause somehow failed to present the same difficulty.²⁹⁵

Redish makes clear that indeterminacy is no reason to find the clause nonjusticiable. He continues: “Ultimately, *any* constitutional provision can be supplied with working standards of interpretation. To be sure, those standards often will not clearly flow from either the language or history of the provision, but that fact does not distinguish them from many judicial standards invoked every day.”²⁹⁶

Yet another strategy to claim justiciability for the Guarantee Clause is by contradicting the argument occasionally propounded by the Court that the Clause’s positioning in Article IV somehow removes it from the scope of judicial review. Since the guarantee is to be provided by the “United States,” the Court sometimes suggests that this excludes the provision from judicial review. There are even prominent scholars who find this structural argument appealing:

[Louis] Henkin believes that *Luther* can properly be grounded on the view that the phrase “the United States shall guarantee,” in Article IV, “plausibly refers to the political branches, and it is not

295. Redish, *Federal Courts*, *supra* n. 23, at 122 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Intl. Shoe Co. v. Wa.*, 326 U.S. 310 (1945); Martin Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 Nw. U. L. Rev. 1112 (1981)); *but see Burnham v. Super. Ct. of Cal.*, 495 U.S. 604, 610 (1990) (where Justice Scalia makes an argument from original intent about transient personal jurisdiction).

296. Redish, *Federal Courts*, *supra* n. 23, at 123.

implausible to read it as excluding monitoring and enforcement by the courts. If so, we may have a unique constitutional clause excluding the courts.”²⁹⁷

However, Redish is probably right when he argues that “[t]here is . . . absolutely nothing in the text of the [G]uarantee [C]lause to distinguish the relevance of judicial review from any other provision.”²⁹⁸ The powers of Congress enumerated in Article I, Section Eight include no provision for judicial review, and there is no reason to limit the holding of *Marbury v. Madison* to shield the Guarantee Clause from judicial monitoring.²⁹⁹ Looking to the logic of *Crowell v. Benson*,³⁰⁰ Redish notes more forcefully that the strictures of the separation of powers are ultimately judicial questions, so the appeal to the political question doctrine to avoid making determinations may itself be violative of a republican form of government.³⁰¹ Indeed, a republican form of government may require judicial review. Again, though, the problem with this attack is that the Court is quite unsympathetic and is still basically committed to a form of nonjusticiability.

The hesitation about the political question doctrine itself leads some to make an oblique attack on nonjusticiability by trying to discredit the doctrine in its entirety, and through it, the claims of nonjusticiability.³⁰² Indeed, the repudiation of the political question doctrine is one of Redish’s primary agenda. He claims “once we make the initial assumption that judicial review plays a legitimate role in a constitutional democracy, we must abandon the political question doctrine, in all its manifestations.”³⁰³ This would lead to justiciability if the Court were to abandon its rather well-established political question doctrine.

We should of course view this ambitious approach with fair pessimism, despite the fact that Justices Blackmun and White once bought the argument.³⁰⁴ Though we may be able to show that in the

297. *Id.* at 117 (quoting Henkin, *supra* n. 23, at 609).

298. *Id.*

299. 5 U.S. 137, 174 (1803).

300. 285 U.S. 22 (1932).

301. Redish, *Federal Courts*, *supra* n. 23, at 117.

302. *E.g.* Weinberg, *supra* n. 292, at 294.

303. Redish, *Federal Courts*, *supra* n. 23, at 134.

304. *See Nixon v. U.S.*, 506 U.S. 224, 239-52 (1993) (White & Blackmun, JJ.,

political question jurisprudence “the Court is likely motivated more by the prudential policy considerations to which . . . Bickel has pointed than it is by the desire to maintain rigid adherence to precedent,” we are still unlikely to be able to uproot the entrenchment of this most significant “passive virtue.”³⁰⁵ Even by showing that a denial of justiciability based on a political question is just as much a policy decision as a conferral of justiciability,³⁰⁶ the Court is unlikely to veer from its political question course.³⁰⁷ Moreover, if it merely takes jurisdiction and grants the point of justiciability without ever finding a violation, as it seems to be doing now, those who care more particularly about the Guarantee Clause will win a Pyrrhic victory in getting jurisdiction without getting the Court to protect republicanism actively.

This brings us to the other strain of the scholarship, which aims to tell the Court just what sort of values it should be looking to enforce under the authority of the Clause. We could devote volumes to summarizing recent prominent arguments in the field.³⁰⁸ Instead, let me merely list some of the suggestions put forth. Amar thinks that “popular sovereignty” is the key to republicanism and the courts ought to start enforcing defects in majority rule.³⁰⁹ And how replacing the words “popular sovereignty” for a “republican form of government”

concurring).

305. Redish, *Federal Courts*, *supra* n. 23, at 114 (citing Bickel, *Least Dangerous*, *supra* n. 24, at 183-98).

306. Wiecek, *supra* n. 6, at 126-27; compare Henkin, *supra* n. 23, at 606 (arguing that in the political question cases the Court “is not refusing to pass on the power of the political branches; it passes upon it, only to affirm that they had the power when it had been challenged and that nothing in the Constitution prohibited the particular exercise of it”); Wayne McCormack, *The Political Question Doctrine—Jurisprudentially*, 70 U. Det. Mercy L. Rev. 793, 821-22 (1993) (arguing that the doctrine is a myth because any pronouncement of nonjusticiability is itself an act of judicial review) with Redish, *Federal Courts*, *supra* n. 23, at 116, 129 (arguing that it is still preferable for the Court to take jurisdiction and then to defer to the (other) political branches).

307. Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. Chi. L. Rev. 643, 650-68 (1989). Perhaps Barkow is right that the doctrine really is on the decline. Barkow, *supra* n. 23, at 242. Perhaps after *Bush v. Gore*, there is no longer such a thing as a political question that the Supreme Court won’t touch.

308. Some of these volumes may be found in *supra* note 291, and its accompanying text.

309. Compare Amar, *supra* n. 40, at 749 with G. Edward White, *Reading the Guarantee Clause*, 65 U. Colo. L. Rev. 787, 787 (1994) (criticizing the view).

helps us clarify our standards is, of course, a question for another time. Hans Linde and Julian Eule think that the Guarantee Clause should serve as a shield against bad referendum outcomes.³¹⁰ How this squares with *Pacific States* is for another essay. Erwin Chemerinsky launches an argument suggesting that not only should Guarantee Clause claims be justiciable, but also that determinations about whether a state's practices deny a republican form of government are *exclusively* judicial questions.³¹¹ His argument proceeds by syllogism: "federal courts should enforce individual rights; the Guarantee Clause embodies individual rights; therefore the federal courts should enforce the Guarantee Clause."³¹² Yet there is no intuitive reason to give the Guarantee Clause the substance of individual rights (whatever these may amount to), instead of concentrating on republican forms.³¹³ Of course, I hope my outline of republicanism here might help fill the gaps in these various suggestions without embracing the exclusive focus on courts. It suffices to note that "[a]ll four of the main papers presented at [the recent conference on the Guarantee Clause] argue from highly

310. Compare Hans Linde, *Who Is Responsible for Republican Government?*, 65 U. Colo. L. Rev. 709, 713-31 (1994); Julian N. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives, and the Threat of Electoral Reprisal*, 65 U. Colo. L. Rev. 733, 733-40 (1994) with Jesse Choper, *Observations on the Guarantee Clause—As Thoughtfully Addressed by Justice Linde and Professor Eule*, 65 U. Colo. L. Rev. 741, 741-42 (1994).

311. Compare Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. Colo. L. Rev. 849, 850-51 (1994) with Ann Althouse, *Time for the Federal Courts to Enforce the Guarantee Clause?—A Response to Professor Chemerinsky*, 65 U. Colo. L. Rev. 881, 881-82 (1994).

312. See generally Althouse, *supra*, n. 311 at 881 (discussing Chemerinsky, *supra* n. 311).

313. *Id.* Althouse opines:

Professor Chemerinsky's theory shows the Court a way to become an activist in a new area, but ignores the real problem: [W]here is the pressing need for the Court to act? With respect to the problem of malapportionment, the Fourteenth Amendment has already relieved the pressure. With respect to monarchies and anarchies, the problems, purely hypothetical and entirely remote, exert no pressure. (Moreover, as Professor Chemerinsky recognizes, it is in such "egregious cases" that we can rely on Congress to enforce the Clause.) The problem of legislation by referendum simply does not excite the same sense of urgency as racial malapportionment. To the extent that a particular referendum produces a law that injures a politically powerless or unpopular minority, the easier path to remedy, if the Court seeks one, remains the same as the remedy for the same law passed through representative channels: [I]t can simply find that the law violates equal protection or some other individual right.

conventional assumptions about text, history, and judicial role to conclude that the courts should enforce the Guarantee Clause.”³¹⁴

The federalist focus of some of the recent Guarantee Clause literature, however, cannot merely be glossed over. If Deborah Jones Merritt is right that state sovereignty is the implicit protection of the Guarantee Clause,³¹⁵ my attempt here to find a federal legislative power in the Clause is rendered moot. Another difficulty with trying to ignore Merritt’s theory that the Clause guarantees to states the integrity of their own lawmaking processes is that the Court, when addressing Guarantee Clause claims, cites Merritt as the primary authority on the Clause’s meaning, not a big surprise given the Court’s neo-federalist tendencies.³¹⁶ Therefore, instead of picking apart the federalist argument by criticizing Merritt’s various moves to replace the words “republican form of government” with a robust guarantee of “state sovereignty,” the final part of this article will make the affirmative argument in favor of seeing in the Clause a federal power, as opposed

Id. at 883-84. Of course, as I argue, the *Lopez* and *Boerne* line of cases present a new urgency for a Guarantee Clause jurisprudence.

314. Robert F. Nagel, *Terminator 2*, 65 U. Colo. L. Rev. 843, 843 (1994).

315. *E.g.* Merritt, *supra* n. 5, at 22-50; Merritt, *supra* n. 247, at 827-32; Laurence H. Tribe, *American Constitutional Law* § 5-23, 398 (2d ed., Found. Press 1988) (noting that, although the Guarantee Clause does not protect individuals, it may confer “judicially enforceable rights upon states as states”); Jonathon K. Waldrop, Student Author, *Rousing the Sleeping Giant? Federalism and the Guarantee Clause*, 15 J. L. & Pol. 267, 299-307 (1999) (arguing for the neo-federalist view as descriptive of the Court’s likely reading).

316. *N.Y. v. U.S.*, 505 U.S. 144, 157 (1992) (citing Merritt, *supra* n. 5, at 3-10; Michael McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. Chi. L. Rev. 1484, 1491-1511 (1987) as incorporating federalist structure into republicanism). There are other courts sympathetic to neo-republicanism: *E.g. Bates v. Jones*, 131 F.3d 843, 858-59 (9th Cir. 1997) (endorsing Merritt’s theory of the federalist principles implicit in the Guarantee Clause); *Kurowski v. Krajewski*, 848 F.2d 767, 774 (7th Cir. 1988) (endorsing federalist principles implicit in the Guarantee Clause, though not embracing federal judicial review); *Gordon v. Griffith*, 88 F. Supp. 2d 38, 43-44 (E.D.N.Y. 2000). The *Printz* Court’s pronouncement on the matter is illustrative:

Although the States surrendered many of their powers to the new Federal Government, they retained “a residuary and inviolable sovereignty.” This is reflected throughout the Constitution’s text, including . . . the Guarantee Clause, Art. IV, § 4, which “presupposes the continued existence of the states and . . . those means and instrumentalities which are the creation of their sovereign and reserved rights.”

521 U.S. at 918-19 (1997) (citations omitted).

to a limit thereupon.³¹⁷ This argument will be at once practical, as it is based on a simple reading of the major cases and history associated with the Clause, as well as theoretical, as it is based on the version of republicanism endorsed here, that of the possibility for the dignity of legislation in contestatory deliberation.

VI. THE GUARANTEE CLAUSE AS A REPUBLICAN SWORD?

The central difficulty with any project seeking to find in the Guarantee Clause a robust federal power is that “the Guarantee Clause has been . . . regarded by the Court more as a shield for the states than as a sword for Congress.”³¹⁸ Nevertheless, given the Court’s long-term commitment to nonjusticiability, and its overt statements conferring upon Congress the right to act under the Clause, a persuasive case can be made that the Clause is a sword to be used to address the sort of legislative concerns I argued for in Part IV. As long as Congress does not “ ‘commandeer’ state resources or authority,”³¹⁹ federalism ought not intrude upon this near plenary power given to Congress, a power Charles Sumner called the “sleeping giant.”³²⁰

When Chemerinsky makes his argument for justiciability, he goes further than necessary to rule out a role for the Congress in redeeming the welshed guarantee.³²¹ He argues that without justiciability “the Clause only has meaning if either the President or Congress is likely to be willing and able to enforce the provision. Such is certainly not the case.”³²² But it is precisely because justiciability is the focus of the Guarantee Clause cases and literature that lawyers spend more time explaining to courts what they ought to do under the Clause than they do telling Congress just what a broad power it has at its disposal. He is quite aware that “[a]s early as 1916, the Court said: ‘As has been

317. See Althouse, *supra* n. 311, at 851; Kathryn Abrams, *No “There” There: State Autonomy and Voting Rights Regulation*, 65 U. Colo. L. Rev. 835, 841 (1994).

318. Coffee, *supra* n. 5, at 457.

319. *Id.* (citing the federalism line of cases for the “commandeering” limitation on federal power enunciated in *N.Y. v. U.S.*, 505 U.S. at 185-86). Obviously, this might present difficulty for the abrogation of sovereign immunity argued for in Part IV, but since it is reasonable to think that the Guarantee Clause powers give Congress some right of constitutional interpretation, it may in good faith abrogate immunity for a state’s failure to provide a republican form of government.

320. Wiecek, *supra* n. 6, at 2.

321. Chemerinsky, *supra* n. 311, at 875-78.

322. *Id.* at 875.

decided repeatedly, the question whether this guaranty has been violated is not a judicial but a political question, committed to Congress and not the courts.’”³²³ He nonetheless urges against relying on Congress.³²⁴ Noting the obvious federalism concerns, he still has some faith that Tenth and Eleventh Amendment problems might be circumvented by being careful not to replicate the scheme of *New York*.

But his central concern is basically the curse of history: “Two hundred years of experience demonstrates that such actions [of Congress invoking the Guarantee Clause] are not likely forthcoming.”³²⁵ Of course, forty years of whining to get justiciability has not been very successful either. Moreover, the cases demonstrate that if lawyers want to heed their courts’ directives, they will begin to focus on suggesting to Congress that they act under the Clause, and not wait for their judges to take their suggestions. I suspect that if Congress acts, the Court will pay much closer attention to the Clause than if we succeed in getting one more symposium urging justiciability. We cannot even agree on these “judicially manageable standards,” the only thing we seem to agree about is that there are some. This Part will show that focusing the Guarantee Clause discourse upon congressional action is warranted by history and cases. It is, thus, a shame to see so few commentators attempt to use it in the way I envision—and even when they do, their proposals are quite modest.

A. CASES AND HISTORY ARMING CONGRESS WITH THE SWORD

The evidence to support the Guarantee Clause’s furnishing Congress with a positive power predates *Luther*’s nonjusticiability doctrine. Indeed, the document itself recommends that entirety of Article IV was meant to discuss the federal power quite broadly.³²⁶ Though surely not intended to rest the Guarantee Clause power exclusively with the Congress, for then we would no doubt see it appear in Article I, Congress certainly may not be excluded from the party vested with Guarantee Clause power, “the United States.” And, of course, since all legislative powers granted by the document are vested in the Congress,³²⁷ we can imagine a Congress passing laws under the authority of Article IV. I should note explicitly that there may also be a *presidential* power lodged in the Clause. While that

323. *Id.* (quoting *Mt. Timber Co. v. Wash.*, 243 U.S. 219, 234 (1916)).

324. *Id.* at 876-77.

facet of the Clause also might be worth investigating, I limit my treatment here to Congress, a site particularly amenable to the theories of republicanism explored here.³²⁸

The Framers' thoughts, unsurprisingly, cohered with the idea expressed in the document. In reaction to the extralegal violence perpetrated by Shays' Rebellion, the Framers acutely felt the weakness of the Articles of Confederation.³²⁹ Thus, when Madison was to present his Virginia Plan, the Guarantee Clause was part of his larger program to give the federal government some constitutional authority to provide help to the states.³³⁰ Surely, this posture suggests that the Clause was meant to benefit the states in some way, but it was primarily dressed as a federal power, the legislative aspect of which resided in Congress. Indeed, the Domestic Violence Clause serves as a "repressive or negative guarantee," whereas that Guarantee Clause itself serves as a positive prophylactic.³³¹ *The Federalist* also lends support to this reading. When exploring the "defects" of the Articles, Hamilton writes:

Without a guaranty the assistance to be derived from the Union in repelling those domestic dangers which may sometimes threaten the existence of State constitutions, must be renounced. Usurpation may rear its crest in each State and trample upon the liberties of the people, while the national government could legally do nothing more than behold its encroachments³³²

Though obviously having in mind the dangers of domestic violence, the liberty of the *people* is his primary concern, along with the want of a federal power to legislate in service of the protection of that liberty. And he is quite clear that state sovereignty, "[t]he inordinate pride of State importance," is hardly the linchpin: "A

325. *Id.* at 878.

326. U.S. Const. art IV.

327. U.S. Const. art. I, § 1 (stating that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States").

328. This is explored in *supra* notes 22, 141-61, and accompanying text. Part III argues why Congress in particular is a good site for debates about what republicanism requires. Here I am trying to justify congressional powers.

329. Wiecek, *supra* n. 6, at 33-50.

330. *Id.* at 41-42.

331. *Id.* at 59 (invoking James Wilson's formulation that was actually adopted at the Convention).

332. Alexander Hamilton, *The Federalist No. XXI*, *supra* n. 19, at vol. I, 135, 136.

scruple of this kind would deprive us of one of the principal advantages to be expected from union[.]”³³³ While trying to delimit the guarantee to “changes [effected] by violence,” Hamilton’s approach lends support to a much broader federal power “against the usurpations of rulers *as against the ferments and outrages of faction and sedition in the community*.”³³⁴ Though surely not countenancing federal antidiscrimination law, Hamilton’s argument could be read quite liberally to sanction action against state laws that are enacted with “fiscal violence,” for example, tyrannizing powerless minorities by outspending them in campaigns. Just as such sanctions could be enforced through courts, so could they be enforced through federal legislation.

Madison’s approach is more deferential to the Anti-federalists in trying to downplay the significance of the Clause.³³⁵ But he is nonetheless concerned about “experiments [that] may be produced by the caprice of particular States, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers[.]”³³⁶ While trying to allay the fears of those who worry about the abdication of state sovereignty, Madison avers that the guarantee will protect the states, in the forms that they enter the union, *acknowledging that there are a variety of acceptable republican forms*.³³⁷ But he nevertheless goes beyond the formal protection to allow for federal intrusion on a state’s sovereignty if the state government is not “*substantially maintained*” as a republic.³³⁸ By providing the federal government (in an Article of the Constitution that mentions the “Legislature” and the “Executive” but not the courts) with an enforcement mechanism that looks to

333. *Id.* at 137.

334. *Id.* (emphasis added).

335. Keeping in mind the context of the *Federalist* helps us understand that we are likely to see Madison, Hamilton, and Jay playing to the state sovereignty folks, while subversively arguing for the need to compromise that sovereignty in service of the union.

336. Madison, *The Federalist No. XLIII*, *supra* n. 19, at vol I, 298.

337. *Id.*

338. *Id.* at 297. Substance and form will always be a slippery slope and I do not think I can do justice to the task of separating them out here. In Part IV, I gave some reason to believe that the legislation proposed there meets the test of being about a *form* of government. I don’t think my treatment there is wholly adequate, but then I’m not trying to delineate precisely the contours of the Clause’s ambit. Nor, it should be mentioned, is it at all clear that Madison had in mind the form-substance debate as it is played out in contemporary jurisprudence.

substance and not merely to *form*, Madison equips the Congress with a sword to maintain substantial republican principles, not merely the structural preference for representation. This is quite different from Congress's Section Five enforcement power, which has been adjudged to disallow substantive legislation after *Boerne*.³³⁹

However, after ratifying the Clause under the force of various arguments sanctioning federal power (and in particular note that in none of the *Federalist* discussions is justiciability or judicial construction of the Clause very important), authorities confer upon the Clause "a repressive aura."³⁴⁰ The Whiskey Rebellion of 1794 links the Clause with its section-mate, the Domestic Violence Clause, as an indirect result of the *Militia Act of 1792* and its progeny, the *Enforcement Act of 1795*.³⁴¹ As Weicek has argued it:

[The Acts were] interpreted . . . as a delegation of congressional power to the President to enforce at least part of Section [IV]'s guarantee. Although it was based only on the [D]omestic [V]iolence [C]lause, Chief Justice Roger Taney read this statute as if it also controlled the allocation of authority under the [G]uarantee [C]lause.³⁴²

The Act is "the basic authority for federal control of state military forces."³⁴³ By treating Article IV, Section Four as a congressional power, the Act, which is still in force today,³⁴⁴ lends support to treating the Guarantee Clause as conferring upon Congress the power to pass legislation—particularly against states as states.

Luther further entrenches this theory. It quite overtly "stresse[s] the special role of the nonjudicial branches of the federal government in implementing this Clause."³⁴⁵ Whether the argument proves coherent that the judiciary is effectively taken out of the Clause with the locution that it is the "United States" that shall provide for the guarantee—and I suspect it probably is not—*Luther* does make this

339. *E.g. Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 82-83 (2000) (declaring portions of the ADEA to be an invalid exercise of § 5 power).

340. Wiecek, *supra* n. 6, at 81.

341. *Id.* at 78-110.

342. *Id.* at 81.

343. *Id.*

344. 10 U.S.C. §§ 331, 332 (2000); Wiecek, *supra* n. 6, at 81.

345. Amar, *supra* n. 40, at 780.

broad-ranging proclamation.³⁴⁶ Redish puts to rest Henkin's suggestion that "the *Luther* decision gave [the political branches] no extra-ordinary deference."³⁴⁷ Redish argues that "Henkin's analysis amounts to little more than a play on words."³⁴⁸ The Guarantee Clause, as read by *Luther*, "vest[s] in the political branches of the federal government exclusive authority to interpret the meaning of and to enforce that provision."³⁴⁹ To be sure, *Luther* emphasizes a presidential power precisely because Congress had supposedly delegated the power in the Militia Act, but in such a recognition is also the implicit argument that Congress had the authority to so delegate.

In the wake of the Dorr Rebellion and Congress's discussions of it is also recognition of congressional authority. The majority report in Congress notes that the "[G]uarantee [C]lause gives Congress 'a supervision over all the state constitutions, so far as the ascertainment of their republican character is concerned,' including the power to 'set aside' those constitutions not reflective of the popular will."³⁵⁰ The majority condemned President Tyler for not supporting Dorr, but the House did not care about what the committee reported and the idea to pass this reading of the Guarantee Clause into law died along with interest in the Dorr Rebellion.³⁵¹ What remains is Taney's relinquishment of the Guarantee Power to the Congress, even if the Congress would not ultimately take responsibility for the mooted question.

Reconstruction presented its own opportunity for congressional exercise of power under the Clause.³⁵² Of course, the need for the Clause was mooted by the passage of the Fourteenth Amendment, but Congress nevertheless looked to the Clause to assert its authority over the states. Charles Sumner—the Clause's greatest champion—recognized that reading the states' secession as a *de facto* forfeiture of

346. *Luther v. Borden*, 48 U.S. 1, 42-43 (1849).

347. Henkin, *supra* n. 23, at 608.

348. Redish, *Federal Courts*, *supra* n. 23, at 115.

349. *Id.*

350. Wiecek, *supra* n. 6, at 109 (citations omitted).

351. *Id.* at 109-10.

352. To be sure, Lincoln might have used the presidential aspect of the Clause. Executive review more generally may have a textual basis in the Guarantee Clause as well. But, again, here I am most interested in the congressional uses because it is Congress that is most well suited to act in service of republican ends, subject to republican procedures.

states' rights would help trigger the Guarantee Clause more easily, but he was nonetheless committed to its use even if the forfeiture theory wouldn't hold.³⁵³ He pressed the Clause upon Congress, urging it to act under the broad powers granted by it.³⁵⁴ The cause was taken up by Henry Winter Davis. Davis argued:

[The Clause] vests in the Congress of the United States a plenary, supreme, unlimited political jurisdiction, paramount over courts, subject only to the judgment of the people of the United States, embracing within its scope every legislative measure necessary and proper to make it effectual; and what is necessary and proper the Constitution refers in the first place to our judgment, subject to no revision but that of the people.³⁵⁵

Ultimately Congress took no specific action under the Clause but did want to take power away from the President's use of the Clause to protect the Southern states. During the Reconstruction, Northerners tried to read a formal "Equal Protection" provision into the Clause under William Goodell, "the foremost antislavery expositor of the Guarantee Clause."³⁵⁶ And slavery's role in republicanism was debated quite actively during Reconstruction along with Congress's powers over the states they viewed as unrepblican.³⁵⁷ Of course, arguments were launched on both sides, with Democrats taking the neo-federalist position that self-government afforded by the guarantee requires a protection of state sovereignty.³⁵⁸ However—and this is most important for my purposes here—the debates were not centralized on the problem of judicial review. Instead, the Congress debated what its own powers were under the Clause. Though the debate was ultimately inconclusive—and did not need resolution owing to the newfound Fourteenth Amendment powers—during the passage of the Civil Rights Bill, for example, representatives overtly relied on the sword that they believed inhered in the Clause.³⁵⁹

But by 1867, even Republicans shied away from the Clause, noticing that Democrats were making their own attempt to use the

353. Wiecek, *supra* n. 6, at 176.

354. *Id.* at 181.

355. *Id.* at 185 (quoting Cong. Globe, 38th Cong., 1st Sess., App. 82-85 (1864)).

356. Wiecek, *supra* n. 6, at 160.

357. *Id.* at 197.

358. *Id.* at 204.

359. *Id.* at 200.

Clause.³⁶⁰ Nevertheless, “[a]s J.A.J. Creswell of Maryland explained, it was clear that the Tenth Amendment could not override the powers confided to Congress by the Guarantee Clause.”³⁶¹ Federalism wasn’t what stood in the way of the congressional power afforded by the Clause. As Sumner put it, “[t]here is no clause which gives to Congress such supreme power over the states as that clause.”³⁶²

A series of cases further entrenched the idea of granting Congress the affirmative power to say what republicanism requires of the states, emasculating the neo-federalist reading of the Clause. In *Georgia v. Stanton*,³⁶³ *Texas v. White*,³⁶⁴ and *White v. Hart*,³⁶⁵ the Court left to Congress the central power to enact the protections of the Clause. By emphasizing that the states are only to be thought of as the people of the states for the purposes of the Clause, the Court encouraged the political questions raised by the Reconstruction to be addressed in Congress, without the worry of overreaching into state sovereignty.³⁶⁶ Justice Chase wrote in *Texas* that “the power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress.”³⁶⁷

In the 1870s, when the Congress needed to take a stand about the Louisiana brouhaha between Kellogg and McEnery, where both wanted to control allocation of electoral votes in the College, Congress was willing to delegate its authority to President Grant.³⁶⁸ Grant was happy to leave the controversy to the state courts, which allowed Kellogg to prevail, who in turn granted the electoral votes to Grant.³⁶⁹ The once Radical Republicans ultimately abandoned the Clause, acknowledging that the Clause gave a power “too great” to the federal government.³⁷⁰ Nonetheless, by acquiescing to Grant’s decision—even though his decision was a further delegation—Congress indirectly

360. *Id.* at 203.

361. *Id.* at 204. As I argued earlier, neither should the Eleventh Amendment.

362. Wiecek, *supra* n. 6, at 214 (quoting Cong. Globe, 40th Cong., 1st Sess. 614 (1867)).

363. 73 U.S. 50 (1867).

364. 74 U.S. 700 (1868).

365. 80 U.S. 646 (1871).

366. Wiecek, *supra* n. 6, at 235.

367. *Tx. v. White*, 74 U.S. 700, 730 (1868).

368. See Wiecek, *supra* n. 6, at 225.

369. *Id.* at 230.

370. *Id.* at 229.

allowed the federal government to exercise the very power at issue. They even went further, arguing that “‘[w]hen the frauds committed are so glaring and widespread as to create public discontent in the state . . . this power of the National Government must . . . be regarded as wise and salutary.’”³⁷¹

Even in *Minor*, where the Court ignored its precedent in *Luther*, which would have recommended dismissing the case for want of justiciability, the Court upheld the portion of *Luther* that conferred upon Congress the exclusive right to act under the Clause.³⁷² In deciding *Minor*’s claim on the merits, the Court still noted that it is

371. *Id.* at 228 (quoting Sen. Rpt. 42-457, ser. 1549 (Jan. 16, 1873)). A different Louisiana brouhaha also provided an opportunity for use of the Clause in the 1930s. Kurland tells the story:

President Roosevelt watched as Long’s corrupt and dictatorial actions continued on such a grand scale that representative government in Louisiana was probably lost. Aside from the ever present corruption, Long, as U.S. Senator and not a holder of any official state office, may have outdone even himself when he “sheparded” forty-four bills through the Louisiana legislature in one memorable 1934 special legislative session. The situation only seemed to worsen as Long’s national stature continued to grow.

In 1935, President Roosevelt, seeking new ideas to address the Louisiana situation, asked the Justice Department to research whether the [G]uarantee [C]lause could be used as a constitutional vehicle to reestablish normal civilian rule in Louisiana and to justify broad congressional action to check tyranny and corruption there as well. A series of memoranda prepared for President Roosevelt by Alexander Holtzoff of the Justice Department analyzed the historical scope of the [G]uarantee [C]lause, and noted that “the framers . . . nowhere defined the term ‘republican form of government’ in connection with the guaranty.” Holtzoff’s conclusion was general, noting that the President had the authority to act alone if it was necessary to call out federal troops, but he suggested that “cooperation on the part of Congress would be required” if any more comprehensive federal action was undertaken pursuant to the [G]uarantee [C]lause. Such action would have included any proposed congressional attempt to legislate against state and local corruption.

President Roosevelt was intrigued by the possibilities that the [G]uarantee [C]lause offered, and he circulated the Holtzoff Memoranda to the Vice President and other Senate leaders. Ultimately, President Roosevelt proposed no action against Long under the [G]uarantee [C]lause, in part because of the perceived constitutional ambiguities noted in Holtzoff’s memoranda, but even more so because of the apparent lack of congressional support for any large scale federal involvement directed at such a popular national figure. Congressional support obviously was essential to pass any [G]uarantee [C]lause based legislation. Most important, however, was Long’s assassination in September 1935, which momentarily obviated the need to rely on novel theories of constitutional power.

Kurland, *supra* n. 5, at 448-49.

372. *Minor v. Happersett*, 88 U.S. 162, 171 (1874).

within Congress's power to alter state voter qualifications.³⁷³ Since Congress had not acted to give women the franchise, the states disqualifying women would still be presumed republican within the meaning of the Guarantee Clause. Nonetheless, the Court did not suggest that it would violate state sovereignty for Congress to impose national voter qualification standards upon the states under the Clause. The Court ignored its commitment to nonjusticiability, but still gave Congress broad discretion to act under the Clause.

Coyle v. Smith did indeed limit this discretion to matters that can genuinely bear some substantial relation to republican government.³⁷⁴ *Coyle* struck a congressional act that curtailed Oklahoma's freedom to pick a site for its capital city.³⁷⁵ The Court again notes that the Guarantee Clause "impose[s] upon Congress the duty of seeing that [a state's republican] . . . form [of government] is not changed to one anti-republican."³⁷⁶ But, under *Coyle*, the Clause "obviously [did] not confer [a] power" upon the Congress to determine where Oklahoma should site its capital.³⁷⁷ Although some have made much of this decision to show that the Guarantee Clause is fundamentally limited by state power, *Coyle*'s holding is quite narrow, since Congress made no effort to show that its action was inspired by the protection of a republican form of government.³⁷⁸ In any case, it is not very easy to see how such a justification would make sense. Republicanism, as was shown in Part II, is quite flexible, but it does not keep us so open-minded that our brains fall out.

Pacific States Telephone & Telegraph v. Oregon,³⁷⁹ which adhered more faithfully to *Luther*'s nonjusticiability theory, also upheld the powers granted to Congress.³⁸⁰ Recognizing that Congress had already spoken about the republican nature of the referendum by admitting Oklahoma in 1907 with its constitutional provisions for Progressive institutional reforms, the Court refused to place its

373. *Id.* at 177.

374. 221 U.S. 559, 567-68 (1911).

375. *Id.* at 579.

376. *Id.* at 567-68.

377. *Id.* at 568.

378. Merritt, *supra* n. 5, at 74-75.

379. 223 U.S. 118 (1912).

380. *Id.* at 151.

thoughts about republicanism in conflict with those of Congress.³⁸¹ Though its logic seemed more concerned with avoiding “strange, far-reaching, and injurious results,” the Court nonetheless recruited a form of institutional competence argument to arm Congress with both the sword and shield in the battle to protect republican principles.³⁸² An effective Congress may often protect the rights of states to organize themselves in variegated ways, but it is within the discretion of Congress to determine when a state ceases to be “substantially” republican enough, triggering a need for federal legislation.³⁸³

Finally, even *Baker v. Carr*,³⁸⁴ which limits *Luther*’s nonjusticiability thesis to only those cases in which political questions arise, can be said to reaffirm *Luther*’s delegation of some of the Guarantee Clause powers to the Congress. By emphasizing the political question doctrine—coherent or not—Brennan keeps alive the

381. Wiecek, *supra* n. 6, at 266.

382. *P. Sts. Tel. & Telegraph*, 223 U.S. at 142.

383. *Barsky v. U.S.*, 167 F.2d 241, 246 (D.C. Cir. 1948). Kurland provides a summary of this extension:

In 1938, as part of the reaction to the Communist “Red Scare,” Congress established the Committee on Un-American Activities of the House of Representatives (HUAC). The constitutionality of the formation of HUAC was challenged in *Barsky v. United States*. In *Barsky*, the defendant was convicted for willful failure to produce records pursuant to a subpoena issued by HUAC. The defendant contended that the establishment of HUAC violated the first amendment.

In affirming the conviction, the District of Columbia Court of Appeals devoted most of its time addressing the scope of the congressional power of inquiry and investigation. However, the court of appeals also appeared to reach the merits of the scope of congressional authority under the [G]uarantee [C]ause, explicitly holding:

Congress is charged with part of the responsibility imposed upon the federal government by that clause of the Constitution which provides that “The United States shall guarantee to every State in this Union a Republican Form of Government.” Art. 4, § 4. This Clause alone would supply the authority for congressional inquiry into *potential threats* to the republican forms of the governments of the States.

There was no discussion of *Luther v. Borden* or the political question doctrine. Thus, although congressional power to investigate is analytically distinct from congressional power to legislate, *Barsky* represents one (albeit analytically unsatisfying) example of where a federal court not only reached the merits of a [G]uarantee [C]ause claim that called into question congressional authority under the clause, but sanctioned broad prospective use of the clause as well.

Kurland, *supra* n. 5, at 449-50.

384. 369 U.S. 186 (1962).

limitation of Guarantee Clause interpretation to the Congress. Brennan stays committed to the proposition that “[G]uarantee [C]lause claims are nonjusticiable only because they present elements of a political question *and not because they touch on matters of state governmental organization*.”³⁸⁵

Justice Douglas’s concurrence in *Baker* directly questions the Court’s abdication of authority to Congress with regard to the Guarantee Clause. He writes, “[t]he statements in *Luther v. Borden*, that th[e] guaranty is enforceable only by Congress or the Chief Executive is not maintainable.”³⁸⁶ Particularly countenancing the voting rights he argues are afforded by the Guarantee Clause, Douglas is quite right to find in this arena a role for the judicial function when presented with Guarantee Clause *claims* from the populace. He cites Woodbury’s dissent in *Luther* for the proposition that as a general matter judges should have a say in what republicanism requires alongside Congress’s pronouncements.³⁸⁷ Of course, this position, though scaling back from *Luther*’s grant of *exclusive* power to the political branches, is an argument for a concurrent power for the judiciary, not a blunting of Congress’s sword altogether. Just what judicial standards a Court might find in the Guarantee Clause extends beyond this article—but *Baker* still provides a sheath for a congressional sword. Even Justice Stevens’ dissent in *Bush v. Gore*³⁸⁸ claims that “in the rare case in which a State’s ‘manner’ of making and construing laws might implicate a [violation of the guarantee of a republican form of government], Congress, not this Court, is likely the proper governmental entity to enforce that constraint.”³⁸⁹

B. RECENT SWINGS OF THE SWORD

As it turns out, however, the “sleeping giant” isn’t completely dormant, and has come out of hibernation, if only intermittently and briefly. These moments of use suggest that the sword may be worth wielding in the contexts suggested in Part IV.

385. Wiecek, *supra* n. 6, at 279 (emphasis added).

386. *Baker*, 369 U.S. at 244 n. 2 (Douglas, J., concurring).

387. *Id.*

388. 531 U.S. 98 (2000).

389. *Id.* at 142 (Ginsburg, J., dissenting) (citing *Ohio v. Hildebrandt*, 241 U.S. 565, 569 (1916); *Luther v. Borden*, 48 U.S. 1, 42 (1849)).

Adam Kurland published an article in 1989,³⁹⁰ finding the Guarantee Clause useful for conferring jurisdiction in a set of laws dealing with corruption. Because corruption of government seems neatly to violate the demands of a republican form of government, Kurland argues that Congress should act under the authority of its responsibility to guarantee republican forms of government.³⁹¹ Responding to the prosecution of governmental officials under the jurisdictional limitations imposed by the Commerce Clause and Postal Power,³⁹² drawn upon in *RICO* and other corruption laws,³⁹³ Kurland advocates use of the Guarantee Clause power by the Congress for help in circumventing what was producing anomalous jurisdictional results.³⁹⁴ He concluded:

[T]hat the Guarantee Clause provides an independent constitutional basis for Congress to legislate against state and local official corruption In addition, the Guarantee Clause gives Congress the authority to establish a broad uniform federal standard of accountability for state and local officials.³⁹⁵

Commentators have not more than passingly noticed his argument. I think it is only a modest measurement and that the Clause sanctions much more.

Indeed, Congress has in fact enacted criminal statutes, using the Guarantee Clause as a constitutional basis.³⁹⁶ For example, in Title VII of the 1968 *Omnibus Crime Control and Safe Streets Act*,³⁹⁷ “Congress found that possession of firearms by the various classes of persons created [*inter alia*] a threat to the guarantee of republican government.”³⁹⁸ And the Supreme Court, in *United States v. Bass*,³⁹⁹ “seemed to concede guardedly that the Guarantee Clause was a legitimate source of constitutional power under which Congress could

390. Kurland, *supra* n. 5.

391. *Id.* at 375-76.

392. U.S. Const. art. I, § 8, cl. 7.

393. 18 U.S.C. §§ 1961-68 (2000).

394. *See* Kurland, *supra* n. 5, at 371.

395. *Id.* at 375.

396. *E.g.* 42 U.S.C. §§ 3711-3797o (2000); Pub. L. No. 90-351, 82 Stat. 197 (1968).

397. *Id.* Is this how I get around *Lopez*?

398. Kurland, *supra* n. 5, at 451.

399. 404 U.S. 336 (1971).

legislate.”⁴⁰⁰ This decision, in conjunction with Kurland’s article has prompted some notable members of Congress to flex some Guarantee Clause muscle,⁴⁰¹ even though the power has yet to garner broad support as a basis to pass legislation.⁴⁰²

This article has been an attempt to urge congressional action under the Clause. Were the Supreme Court to find the Clause justiciable thereafter—and I suspect it would—at least it would need to delineate the contours of a new power with a jurisprudence that is likely not as constrained by federalist concerns as have been the Commerce and Section Five Enforcement Clauses since *Lopez* and *Boerne*.

VII. CONCLUSION

Perhaps John Adams was right that “there is not in lexicography a more fraudulent word” than republicanism.⁴⁰³ And Wiecek may be right that “it is unsafe to generalize about the precise meaning of the term” beyond “the negative senses of ‘republican,’ that is nonmonarchical and nonaristocratic” forms of government (and it isn’t even clear that that is safe either).⁴⁰⁴ But I suspect that Madison wrote into the Constitution a bit more when he recommended that the United States shall guarantee to every state in the union a republican form of government. He writes: “It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part.”⁴⁰⁵ This goal of republican society can only be attained according to Madison “by comprehending in the society so many separate descriptions of citizens.”⁴⁰⁶ By breaking society into “so many parts,

400. Kurland, *supra* n. 5, at 451-52. Ultimately, the Act was repealed but for reasons unrelated to the Guarantee Clause. *E.g.* 131 Cong. Rec. S23 (daily ed. Jan. 3, 1985).

401. *See e.g.* 134 Cong. Rec. 33,296 (1988) (statement of Rep. Conyers); 133 Cong. Rec. 32,959-61 (1987) (statement of Rep. Conyers).

402. *But cf.* 28 U.S.C. §1738C (2000); Pub. L. 104-199, 110 Stat. 2419 (1996); H.R. Rpt. 104-664 (July 9, 1996) (where Congress has recently called upon a different part of Article IV, recruiting § 1 to claim their power to pass the *Defense of Marriage Act*).

403. Wiecek, *supra* n. 6, at 13 (citing John Adams, *A Defense of the Constitutions of Government in the United States of America* 160-61 (Da Capo Press 1971)).

404. *Id.* at 17.

405. James Madison, *The Federalist No. 11*, *supra* n. 19, vol. 1, 353, 356.

406. *Id.*

interests and classes of citizens,”⁴⁰⁷ Madison hopes that pluralism and contestation will combine to safeguard against regression out of a republican form of government. Of course, the possibility for a regression is precisely what the Guarantee Clause is aimed at protecting against, and precisely why there is a federal power for the guarantee.

Unfortunately, as I have shown here, commentators of both republicanism and the Guarantee Clause share a similar fixation. Both neo-republican legal scholars, as well as scholars wanting to make use of the Guarantee Clause, are consumed with the judiciary. To be sure, both have good reasons for resting their hopes with independent judges. Nevertheless, as a matter of normative political theory, republicanism has much to recommend to legislators; it can serve as a basis to enact legislation that the Court has adjudged is beyond the authority vested by the Commerce and Section Five Enforcement Clauses. Moreover, as a matter of practical politics, the struggle for the justiciability of the Guarantee Clause proceeds at a snail’s pace, if it can even be said to be progressing at all. Therefore, this article recommends that Congress act under a power that even the Supreme Court has suggested rests with it.

When Congress does enact legislation under the authority of the Clause, lawyers can of course expect the Court to devise standards of judicial review. And such a reaction would be completely appropriate: “[I]t would be only performing its usual function of keeping the legislature within those powers actually conferred.”⁴⁰⁸ Yet, the Court’s precedent will necessarily limit its ability to insist on the rigorous neo-federalist standards it has recently been propounding. Since Congress—by taking responsibility for the guarantee—will be heeding the Court’s own advice, the Court should find itself in a bind; a bind from which they will hardly need Houdini to escape. They will simply grant what many lawyers have been arguing for decades, that the Clause raises justiciable questions after all. We may not like the jurisprudence we get as a result, but it will have to be more deferential than the Commerce Clause and Enforcement Clause jurisprudences

407. *Id.* at 357.

408. Bonfield, *Desuetude*, *supra* n. 5, at 565.

have become in the wake of neo-federalism. Perhaps they will grant what Sumner already knew in 1865:

Words receive expansion and elevation with time. Our fathers builded [sic] wiser than they knew. Did they simply mean a guarantee against a king? Something more I believe—all of which was not fully revealed to themselves, but which we must now declare in light of our institutions. We know more than Montesquieu on the question. The time has come to fix a meaning on these words My point is that liberty, equality before the law, and the consent of the governed are essential elements of a republican government.⁴⁰⁹

But let us not be too optimistic. After all, I'm just scheming here.

409. Edward L. Pierce, *Memoir and Letters of Charles Sumner* vol. IV, 258-59 (Arno Press 1969) (letter from Sumner to Francis Lieber, dated Oct. 3, 1865).

NOTES AND COMMENTS

